SUPREME COURT OF THE UNITED STATES.

No. ~~000.~~ 107.

ERASTUS SPARROW AND JOSEPH TRENCH, PLAINTIFFS IN ERROR,

vs.

CHARLES L. STRONG, GEORGE HEARST, ALEXANDER E. O'NEIL, ROBERT PAXTON, JOSEPH CLARK, H. THOMPSON, JOHN HENNING, JOHN O. EARL, L. W. NEWELL, AND H. H. RAYMOND.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEVADA.

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3 *Statement.*

First judicial district court, Storey County, Nevada Territory.

ERASTUS SPARROW *et als.*
vs.
CHARLES L. STRONG *et als.*

Complaint.

In the district court of the first judicial district for Nevada Territory, in and for the county of Storey.

ERASTUS SPARROW AND JOSEPH FRENCH, plaintiffs,
vs.
CHARLES L. STRONG, GEORGE HEAD, ALEXANDER E. O'NEILL, Robert Paxton, Joseph Clark, H. Thompson, John Henning, John O. Earl, L. W. Newell, and H. H. Raymond, defendants.

Action at law to recover an undivided interest in a mining claim.

The above-named plaintiffs complain of the above-named defendants, and for cause of action allege that said plaintiffs are lawfully seized, and the owners for mining purposes, and lawfully entitled to the possession of an undivided two hundred and eighty feet in length, being an equal undivided 280–1200 part of that certain quartz ledge, lode, or vein of gold and silver bearing rock and auriferous and argentiferous earth, together with all the dips, spurs, and angles of said lode, ledge, or vein, rock or earth, located and situate in the Gold Hill mining district, in the county of Storey, and Territory of Nevada, described as follows, to wit: that quartz vein of gold and silver bearing earth and rock known and recorded in the
4 Gold Hill mining records as the Yellow Jacket vein or claim, situate between Gold Hill proper and what was known at the time of the location of the said claim as the Houseworth claim, in Crown Point Ravine, said mining ground comprising twelve hundred feet in length on the vein, including all its dips and spurs, commencing at the northern line of said Houseworth claim, on said vein or ledge, and running thence northerly along and upon said ledge twelve hundred feet, including twenty-five feet of surface on each side of the ledge or vein, being the same ground or claims taken up and located on or about the first day of May, A. D. 1859, by H. B. Camp, John Bishop, and J. F. Rogers, the said undivided two hundred and eighty feet of the ground hereinafter mentioned and described being a part of the same interest or claim held by the said H. B. Camp as original locator, and by him by John J. Musser, his attorney in fact, conveyed to H. Van Horn.

And said plaintiffs further say that said defendants are now in the wrongful possession of the said part and portion, to wit, the said undivided two hundred and eighty feet above described of said mining ground, and they wrongfully withhold the possession thereof from said plaintiffs, to their damage one thousand dollars.

Wherefore plaintiffs sue and demand judgment for the restitution of said undivided two hundred and eighty feet of said mining ground, and that plaintiffs recover possession of the same, and for their costs of suit.

CHARLES H. S. WILLIAMS,
LORENZO SAWYER,
BRUMFIELD & GILCRIST,
Att'ys for Plaintiffs.

Endorsed and filed Feb'y 12th, 1862.

D. M. HANSON, *Clk.*

[Rec. ~~soc~~, D. T. 1864.]—1

Summons.

In the district court of the first judicial district.

TERRITORY OF NEVADA,
County of Storey, ss:

The people of the United States of America in the Territory of Nevada send to Charles L. Strong, George Hearst, Alexander E. O'Neill, Robert Paxton, Joseph Clark, H. Thompson, John Henning, John O. Earl, L. W. Newall, and H. H. Raymond, greeting:

You are hereby required to appear in an action commenced against you, as defendants, by Erastus Sparrow and Joseph Trench, as plaintiffs, in the district court of the first judicial district in and for the county of Storey, Territory of Nevada, at Virginia City, and answer the complaint therein, which is on file with the clerk of said court, within ten days after the service upon you of this summons, (exclusive of the day of service,) if served in said county, or twenty days if served out of said county but within said district, and in all other cases forty days, or judgment by default will be taken against you according to the prayer of this complaint.

The said action is brought to recover the possession of two hundred and eighty-four (284) undivided feet of mining ground in the claim known as the "Yellow Jacket claim," situate at Gold Hill, said county and Territory, together with costs of suit. And you are further notified that if you
6 fail to appear and answer the said complaint, the said plaintiffs will apply to the court for the relief demanded therein.

[L. S.] In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 12th day of February, A. D. 1862.

DAVID M. HANSON,
Clerk U. S. District Court, N. T.

Endorsed and filed on return, February 27th, 1862.

D. M. H. HANSON, *Clerk.*

7 In the district court of the first judicial in and for the county of Storey.

ERASTUS SPARROW AND JOSEPH TRENCH, plaintiffs,
vs.
CHARLES L. STRONG, GEORGE HEARST, ALEXANDER O'Neill, Robert Paxton, Joseph Clark, John Henning, and John O. Earl, impleaded with H. Thompson, H. H. Raymond, and W. Newall, defendants.

Now comes all of the defendants in the above-entitled cause, except the defendants H. Thompson, H. H. Raymond, and W. Newall, and for answer to the complaint of the said plaintiffs in said cause deny all and singular the obligations therein contained. They deny that plaintiffs are, or at any time have been, seized, or the owners of, or are entitled to the possession of, the undivided two hundred and eighty feet in length upon the quartz ledge or lode mentioned in said complaint, or any part thereof. They deny that they, the said defendants, or either of them, are, or at any time have been, in the wrongful possession of the said undivided two hundred and eighty feet, or any part or portion thereof; but to the contrary thereof aver that they are now, and for a long time prior to the bringing of this suit have been, in the rightful and lawful possession of said undivided interest as the true and lawful owners thereof.

For further answer these defendants aver that on, to wit, the thirteenth

day of March, in the year of our Lord one thousand eight hundred and sixty[1]
H. B. Camp, who is mentioned in said complaint, being the origina
8 locator and owning said undivided two hundred and eighty feet, and having full right and power to dispose of the same, did, by and through his agent and attorney in fact, thereunto duly authorized and empowered, and in consideration of the sum of thirteen thousand seven hundred and fifty dollars, ($13,750,) to him then and there duly paid, sell and convey the said undivided two hundred and eighty feet to the defendants herein, Charles L. Strong and George S. Hearst, from whom the remaining defendants herein named, except Thompson, Raymond, and Newall, derive title; that upon the day and year last aforesaid the said Strong and Hearst, by force of the conveyance aforesaid, did, as they lawfully might do, enter upon and become lawfully seized and possessed of said undivided interest, and that they, the said Strong and Hearst, and their said co-defendants, have, from that time to the time of the bringing of this suit, been in the lawful, quiet, and peaceable possession of the same, as the true and lawful owners thereof.

Further answering, defendants aver that the said plaintiffs claim title to said undivided two hundred and eighty feet "by virtue of a pretended conveyance from the said H. B. Camp, by and through his alleged agent and attorney in fact, J. J. Musser, to one H. H. Van Horn, and an alleged conveyance from the said Van Horn to the plaintiff Erastus Sparrow, but defendants aver that the said alleged conveyance from Camp to Van Horn was totally inoperative and void, and passed no title whatever to said Van Horn, for defendants say that said alleged conveyance was executed on the 15th day of May, A. D. 1861, at which time the said Camp had no right,
title, or interest whatever in and to said undivided interest, or any
9 part thereof, and the said Musser had no right, power, or authority to sell or dispose of the same. They further aver that at the time of the alleged sale and conveyance by the said Camp to the said Van Horn, to wit, on the 15th day of May, 1861, the defendants were in the quiet, peaceable, and exclusive possession of the whole of said undivided interest, claiming and holding the same in their own right by virtue of the said conveyance to Strong and Hearst, adversely to the said Camp and all other persons, and that said sale and conveyance to said Van Horn by said Camp was totally void and inoperative, and the same passed no right, title, or interest whatever to said Van Horn. Defendants further aver that from the said thirtieth day of March, 1860, up to the time of bringing this action they, the said defendants, have been in the constant, exclusive, and peaceable possession of the whole of said undivided interest, and that during all of that period they, in good faith believing that legal and beneficial title and estate of said undivided interest was vested in them, and having no notice whatever of the adverse claim of title of the said Camp and those claiming under him, expended a large amount of money, and much time, labor, and material in the effort to open and work the same; that the aggregate amount of all such expenditures by them made was about five thousand dollars, and that neither the said Camp, nor the said Van Horn, nor the said plaintiffs, though well knowing of the possession of said defendants, and of their large expenditures in time, material, labor, and money, ever notified said defendants, or either of them, of his or their adverse claim of title thereto, but, on the
contrary, quietly stood by and tacitly acquiesced in the exercise by
10 defendants of many acts of ownership over said undivided interest, and at no time did they, or either of them, forbid said defendants working said interest, or forewarn them of the existence of the alleged adverse claim or title or of their intention to assert the same.

For further answer and plea in this behalf, defendants say that neither

the said plaintiffs, nor any one whose title and estate they have, has had the possession of the said undivided interest within the space of two years next preceding the bringing of this action, and therefore that any right of the plaintiffs to enter upon such undivided interest, or recover the same from these defendants, has been barred and taken away by the provisions of the statutes in such case made and provided.

And defendants, having fully answered, pray judgment of the said action at the same may be dismissed, and that they have their costs of suit.

TERRITORY OF NEVADA,
County of Storey, ss:

Joseph Clark, one of the defendants herein, being duly sworn, says he has heard the foregoing answer read, and knows its contents; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

JOS. CLARK.

Subscribed and sworn to before me this 27th day of February, 1862.

D. M. HANSON,
Clerk 1st Dist. Court.
By CHAS. RAWSON, *Dept.*

11 *Replication.*

In the district court of the first judicial district for Nevada Territory in and for the county of Storey.

ERASTUS SPARROW AND JOSEPH TRENCH
vs.
CHARLES L. STRONG, GEORGE HEARST, *et al.*

Now come the said plaintiffs, and for replication to the answer of the defendants, excepting the defendants Thompson, Raymond, and Newall, say that they admit that said defendants are in possession of the said undivided interest described in the plaintiffs' complaint and mentioned in said answer, but they deny that said defendants or either of them ever were or are now in the rightful or lawful possession thereof or any part thereof, or that they or either of them are in possession of the same or any part thereof as the true or lawful owners thereof, or in any other manner or character than wrongfully in all respects as stated in plaintiffs' complaint.

Said plaintiffs admit that on the 13th day of March, A. D. 1860, the time mentioned in said answer, the said H. B. Camp and the original locator and owner of said undivided two hundred and eighty feet, and that he has full right and power to dispose of the same as stated in said answer, but said plaintiffs, upon and according to their information and belief, deny that said H. B. Camp, on the said 13th day of March, A. D. 1860, or at any other time, either in person or by and through his agent or attorney in fact duly authorized or empowered, or otherwise, in any manner or by any person whomsoever having authority to sell or convey, either for or in consideration of the sum mentioned in said answer or for or in consideration of any other-

12 sum, or for any consideration, either sold or conveyed said two hundred and eighty feet or any part thereof to said defendants Charles L. Strong and George Hearst or either of them, or either or any of the other defendants; and they say that said H. B. Camp never did, either in person or by any other person, at any time or in any manner, sell or convey said two hundred and eighty feet or any part thereof to said defendants, or any or either of them.

And they deny, according to their information and belief, that said defendants or any or either of them ever paid to said H. B. Camp the said sum of $13,750, mentioned in said answer, or any other sum whatever, and said plaintiffs admit that said other defendants have no other claim or title to said undivided interest than that derived through said Strong and Hearst, but they deny that said defendants, Strong and Hearst, or either of them, ever had any interest or title in or to said premises of any kind whatever.

And said plaintiffs, upon and according to their information and belief, deny that said Strong and Hearst, or either of them, by force of said conveyance alleged in said answer, or by force of any other conveyance by or from said Camp, entered upon or become seized or possessed of the said undivided interest or any part thereof, or that they in manner lawfully entered upon or became lawfully possessed thereof or of any part thereof, and deny that said defendants have, from the time stated in the answer or for any time whatever, been in the lawful or peaceable possession of the
13 same or any part thereof as the true and lawful owners thereof, or otherwise than wrongfully and in the manner stated in the said complaint.

Said plaintiffs deny that the said conveyance mentioned in said answer from said Camp to said Van Horn was totally, or in any respect, inoperative or void, and deny the allegations that said conveyance passed no title to said Van Horn; but, on the contrary, said plaintiffs, upon their information and belief, aver that said conveyance was in all respects valid and passed the full title and right of possession in and to said interest in said mining claim to said Van Horn, and that said plaintiffs, by conveyance duly executed, have since acquired the said right, title, and interest of said Van Horn.

And said plaintiffs, upon and according to their information and belief, deny the allegations of said answer, that on the said 15th day of May, 1861, the time at which said conveyance is alleged to have been made, the said Camp had no right, title, or interest whatever in or to said undivided interest, or to any part thereof, and the allegations that the said Musser had no right, power, or authority to sell or dispose of the same. On the contrary, said plaintiffs are informed and believe, and aver the fact to be, that at the said date, and at the time of making of said deed to said Van Horn, the said Camp did have the right and title to said interest, and was the lawful owner of said two hundred and eighty feet so conveyed by said deed and described in said complaint, and that said Musser at the said time was fully authorized and empowered, as the attorney in fact of said Camp, to sell, dis-
15 pose of, and convey said interest to said Van Horn.

Said plaintiffs admit that, on the said 15th day of May, A. D. 1861, the said defendants had entered into the possession of the whole of the said undivided interest, but denies that they are rightfully in possession thereof by virtue of said supposed conveyance to said Strong and Hearst, or that said conveyance conveyed to said defendants, or either of them, any right or interest in said premises as against said Camp or any other person. On the contrary, said plaintiffs are informed and believe, and so aver the fact to be, that said defendants, at said time and at all other times, were intruders upon said premises, without any right whatever, and were wrongfully in possession of said premises in all respects, as alleged in plaintiffs' complaint, and upon and according to their information and belief; the said plaintiffs deny the allegations of said answer, and every part thereof, that said sale and conveyance by said Camp to Van Horn was void, or in any respect inoperative, and the allegation that the same passed no right, title or interest to said Van Horn.

Plaintiffs admit that said defendants have, since their said unlawful intrusion and entry upon said premises to the bringing of this suit, been in possession of said undivided interest; but they allege that the said posses-

sion has been unlawful and wrongful, and against the will and without the consent of the said Camp or Van Horn, these plaintiffs, and against the claim and constant and continued protest of their plaintiffs, and said Camp and Van Horn.

15 And upon and according to their information and belief, said plaintiffs deny that said defendants, or any of them, in good faith believe or in any manner believed that the legal or beneficial title or estate in said undivided interest, or any part thereof, was vested in said defendants or either of them. And said plaintiffs deny that said defendants, or any of them, without notice of the claim or title of said Camp, or those claiming under him, expended a larger sum of money, or any sum of money, any time or labor, or materials, in their efforts to open or work said claim or interest; but, on the contrary, said plaintiffs aver that said defendants at all times, both before and after their entry upon said undivided interest, were informed and fully aware of the claim and title of said Camp, of said parties claiming under him, and that the monies, time, and labor, in said answer supposed to have been expended by said defendants, was expended with notice on the part of said defendants, and each of them, of the right, title, interest and claim of said Camp and of said Van Horn and these plaintiffs, and with full knowledge on the part of said defendants that said defendants had no right or title to said mining claim or interest therein, and said plaintiffs, upon and according to their information and belief, deny that the aggregate amount of all such expenditures by the defendants made was five thousand dollars, or about that sum. And plaintiffs deny the allegation of

16 said answer, that neither the said Camp, nor the said Van Horn, nor the said plaintiffs, ever notified said defendants, or either of them, of his or their adverse claim of title to said interest, and deny the allegation that they, or either of them, quietly stood by, or tacitly acquiesced in the exercise by said defendants of many or any acts of ownership over said undivided interest, and deny the allegation that at no time that they, or either of them, forbid said defendants working said interest, or forewarn them of the existence of the alleged adverse claim or title, or of their intention to assert to the same; but, on the contrary, the said plaintiffs aver that said Camp and said Van Horn, and the said plaintiffs, did frequently, and at all times, after said defendants wrongfully entered into the possession of said undivided interest as hereinafter and in said complaint stated, notify said defendants of their claim and of their intention to assert the same, and further, often sought to obtain the possession thereof, but were prevented from so doing, and wrongfully kept out of the possession of said premises by said defendants.

And as to so much of said answer as sets up the statute of limitations, said plaintiffs say that said portion of said answer does not state facts sufficient to constitute a defense to said action.

And without waving said objection to said portion of said answer which sets up the statute of limitation, but still relying and insisting thereon for replication thereto, said plaintiffs deny the allegations of said answer, and each and every part thereof, to the effect that neither the said plain-

17 tiffs, nor any one whose title or estate they have, had the possession of the said undivided interest within the space of two years next preceding the bringing of this action, and they deny that any right of the plaintiffs to enter upon said undivided interest, or to recover the possession of the same from said defendants, has been barred or taken away by the provisions of the statute in such cases made and provided.

WILLIAMS, SAWYER & WILLIAMS,
Attorneys for Plaintiffs.

TERRITORY OF NEVADA, *Storey County:*

Joseph Trench, one of the plaintiffs, being duly sworn on behalf of himself and his co-plaintiffs, deposes and says that he has heard the foregoing replication read and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

JOS. TRENCH.

Subscribed and sworn to before me this 10th day of March, A. D. 1862.

D. M. HANSON,
Clerk 1st District.

18 *Disclaimer of Raymond and Thompson.*

In the district court of the first judicial district for N. T., in and for the county of Storey.

ERASTUS SPARROW AND JOSEPH TRENCH
vs.
CHARLES L. STRONG *et al.*

Now come the defendants, H. H. Raymond and ——— Thompson, sued by the name of H. Thompson, defendants in the above-entitled action, and each for himself for answer says that he disclaims any right, title, interest, possession, or claim of any kind or nature whatsoever to the said undivided two hundred and eighty feet described and claimed in said plaintiffs' complaint, and they hereby consent that judgment without costs be entered for the possession of said individual interest described in said complaint as against them and each of them.

STEWART, KIRKPATRICK & RISING,
J. R. McCONNELL,
Att'ys for def'ts.

Endorsement.

SPARROW AND TRENCH
vs.
C. L. STRONG *et al.*

Disclaimed.

H. H. RAYMOND *et al.*

Filed May 28, 1862.

DAVID M. HANSON, *Clerk.*

19 *Exceptions of plaintiff.*

SPARROW AND TRENCH
vs.
C. L. STRONG *et al.*

On the trial of the above-entitled cause the plaintiffs, to maintain the issues on their part, offered as a witness J. J. Musser, esq., and the defendant objected to said witness, on the ground that it appeared from a power of attorney from H. B. Camp to said Musser, dated September 10, 1859, before introduced in evidence, in the words following, to wit, (see page 27,) and from a deed from H. B. Camp by said J. J. Musser, his attorney in fact, dated May 15, 1861, to H. Van Horn, before introduced in evidence by plaintiffs, which deed is in the words and figures following to wit, (see page 28,) that said J. J. Musser is interested in the event of this action, and for that reason incompetent as a witness. The court sustained the objection, and refused

to permit said Musser to testify; to which ruling the plaintiffs, by their counsel, duly excepted.

GORDON N. MOTT,
District Judge, 1st District.

Endorsement.

SPARROW AND TRENCH *vs* C. L. STRONG *et al.* } Plaintiffs' exceptions.—Sawyer and Williams, att'ys for pl'ffs.

Filed May 22d, 1862.

D. M. HANSON, *Clerk.*

20 *Verdict of the jury.*

We, the jurors in the case wherein Sparrow and Trench are plaintiffs, and Strong, Hearst, O'Neil, and others are defendants, do find for the defendants.

Virginia City, May 21st, 1862.

WM. ARRINGTON, *Foreman.*
JOHN BRICKELL.
G. H. DANA.
S. H. WATTENBERGER.
WALTER WINN.
F. HARTENETT.
JUSTIN KNOX.
HIRAM S. FAILOR.
CHAS. S. COOVER.
S. M. COLLINS.
A. J. GOULD.
JOHN LENT.

21 *Judgment.*

First district court, Storey County.

ERASTUS SPARROW AND JOSEPH TRENCH *vs.* CHARLES L. STRONG, GEORGE HEARST, JOHN O. EARL, Joseph Clark, Alexander O'Neil, Robert Paxton, John S. Henning, *et als.*

The above-entitled cause came on to be tried upon the pleadings, and a jury of twelve having been duly and regularly empannelled and sworn, and the proofs and testimony of the respective parties having been fully adduced, and the cause argued, and the jury having been charged and instructed by the court, and retired for deliberation and afterwards returned into court and rendered a verdict for said defendants. Wherefore, in consideration of the premises, the verdict, and the law, it is hereby ordered that the said defendants, Chas. L. Strong, George Hearst, John O. Earl, Joseph Clark, Alex. E. O'Neil, Robert Paxton, and John S. Henning, have and recover judgment of, from, and against the said plaintiffs, Erastus Sparrow and Joseph Trench, in said action, and for their costs expended, hereby taxed at $101 25, and that execution be issued therefor.

Done in open court this 22d day of May, A. D. 1861.

GORDON N. MOTT,
District Judge, 1st District.

22 In the district court of the first judicial district, Storey County, N. T.

ERASTUS SPARROW AND JOSEPH TRENCH, pl'ffs,
vs.
CHARLES L. STRONG, GEORGE HEARST, ALEXANDER O'NEIL, Robert Paxton, Joseph Clark, John Henning, and John O. Earl, impleaded with N. Thompson, N. N. Raymond, and W. Newall, defendants.

To the defendants or their attorneys :

Take notice that the plaintiffs in the above-entitled action appeal to the supreme court of this Territory from the order made in this cause on the 13th day of November, A. D. 1862, by the district court of the first judicial district, overruling the plaintiffs' motion for a new trial, argued and submitted at the May term of this court, to which ruling plaintiffs duly excepted.

WILLIAMS & SAWYER,
BRUMFIELD & GILCRIST,
Pl'ff's att'y.

To CLERK 1*st judicial district court.*

Endorsement.

SPARROW AND TRENCH *vs.* C. L. STRONG *et al.* } Notice of appeal.

Filed Nov. 15, 1862.

D. M. HANSON, *Clk,*
By C. RAWSON, *Deputy.*

23 *Bond on appeal.*

District court, 1st judicial district, Storey County, N. T.

ERASTUS SPARROW AND JOSEPH TRENCH, pl'ffs,
vs.
C. L. STRONG, GEORGE HEARST, ALEXANDER O'NEIL, Robert Paxton, Joseph Clark, John Henning, and John O. Earl, impleaded with N. Thompson, N. N. Raymond, and W. Newall, defendants.

Whereas the above-named plaintiffs, Erastus Sparrow and Joseph Trench, appeal to the supreme court of the Territory of Nevada, from an order made by the district court of the first judicial district, on the 13th day of November, A. D. 1862, overruling the plaintiffs' motion for a new trial in the above-entitled cause, argued and submitted at the May term of this court: Now, therefore, in consideration of the premises and of such appeals, we, the undersigned, Joseph Loryea and William Arrington, do hereby, jointly and severally, undertake and promise, on the part of the appellants, that the said appellants will pay all damages and costs which may be awarded against them on appeal, not exceeding three hundred ($300) dollars, to which amount we acknowledge ourselves jointly and severally bound.

In witness whereof, we have hereunto set our hands and seals this 15th day of November, A. D. 1862.

JOSEPH LORYEA. [SEAL.]
WM. ARRINGTON. [SEAL.]

24 COUNTY OF STOREY, *ss:*

Joseph Loryea and William Arrington, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally

sworn, say, each for himself, that he is worth double the amount specified in said undertaking, over and above all his just debts and liabilities of property exempt from execution.

JAMES LORYEA. [SEAL.]
WM. ARRINGTON. [SEAL.]

Subscribed and sworn to before me this 19th day of November, A. D. 1862.

D. M. HANSON, *Clerk 1st Dist.*
By CHARLES RAWSON, *Deputy.*

Endorsement.

SPARROW AND TRENCH
vs.
STRONG, HEARST, *et al.*
} Undertaking on appeal.

Filed and approved Nov. 19th, 1862.

D. M. HANSON, *Clk.*
By CHAS. RAWSON, *Deputy.*

25 *Stipulation.*

District court, 1st judicial district Storey County, Nevada Territory.

ERASTUS SPARROW *et al.*, pl'ffs,
vs.
CHARLES L. STRONG *et al.*, def'ts.

In the above-entitled cause it is hereby stipulated, that whereas a notice of appeal to the supreme court of this Territory has been given by the plaintiffs herein, from an order made by the court of the 1st judicial district on the 13th day of November, A. D. 1862, overruling the plaintiffs' motion for a new trial, and it being necessary that a statement be filed before an appeal can be perfected: Now, therefore, it is hereby mutually agreed, by and between the parties to this suit, that the foregoing statement used on the motion for a new trial be considered as the settled statement on appeal to the supreme court of this Territory, and that the same is filed as of this date.

WILLIAMS & SAWYER,
Attorneys for Plaintiffs.

STEWART, KIRKPATRICK & RISING,
of Counsel for Defendants.

Virginia City, Nov. 22nd, 1862.

26 *Statement.*

District court, first judicial district, Storey County, Nevada Territory.

SPARROW AND TRENCH
vs.
CHAS. L. STRONG *et al.*

Now comes the said plaintiffs, and move the court that the verdict of the jury rendered in the above-entitled cause be vacated and set aside, and the judgment therein vacated, and a new trial granted upon the grounds following, to wit:

1st. Insufficiency of the evidence to justify the verdict in said cause.

2nd. The verdict is against law.

3rd. For error in law occurring at the trial, and accepted to by the plaintiffs.

And plaintiffs specify the following errors at law, among others:

1st. The court erred in refusing to permit J. J. Musser, esq., to testify as a witness on behalf of the plaintiffs.

2nd. The court erred in the general charge given to the jury.

3rd. The court erred in refusing the instructions mentioned in the statement hereto annexed, asked by counsel for the plaintiffs.

4th. The court erred in giving the instructions in said statement mentioned, asked by defendants' counsel.

Fourth. Surprise, which ordinary prudence could not have guarded against.

27 Fifth. Newly-discovered evidence material for the plaintiffs, which they could not with reasonable diligence have discovered and produced at the trials. And the said motion is made based upon the following statement of the evidence introduced and exceptions taken at the trial of said action, and of the grounds upon which plaintiffs rely, and upon the pleadings in said action, and the affidavits hereto annexed.

The jury having been empannelled, and the case opened, and it having been stated that it was admitted that the title of the mining ground in question in this suit was in one H. B. Camp on the 30th day of March, A. D. 1860, and that both parties claimed title through said Camp, the plaintiffs, to maintain the issue on their part, introduced the following documentary testimony, to wit:

1st. A power of attorney from said H. B. Camp to J. J. Musser, in the words and figures following, to wit:

Power of att'y of Camp to Musser.

"CARSON CITY, *Sept. 10th*, '59.

"This is to certify that I this day empower J. J. Musser as my attorney in fact, to take charge of and sell or otherwise dispose of my one undivided one-fourth interest in the claims known as the "Yellow Jacket" claims, located in Gold Hill, in Carson County, U. T., hereby ratifying all that said J. J. Musser may do in the premises.

"H. B. CAMP."

Attest: A. SENDAWN.

2nd. An instrument in writing, marked "B," in the words and figures following, to wit:

Deed from Camp to Van Horn.

"This indenture, made this fifteenth day of May, in the year of our Lord one thousand eight hundred and sixty-one, between John J. Musser,

28 as attorney in fact of H. B. Camp, of the first part, and H. Van Horn, of Silver City, Nevada Territory, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of twenty-five hundred dollars, lawful money of the United States of America, to him in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, conveyed, and quitclaimed, and by these presents does grant, bargain, sell, remise, release, convey, and quitclaim, unto the said party of the second part, and to his heirs and assigns forever, all the right, title and interest, estate, claim, and demand,

both in law and equity, as well in possession as in expectancy, of the said party of the first part, of, in, and to that certain portion, claim, and mining right, title, or property on that certain vein or lode of rock, containing precious metals of gold and silver, and situate in the Territory of Nevada, United States of America, and described as follows, to wit: The entire right, title, claim, and interest of the said H. B. Camp, in and to an undivided interest of three hundred feet, more or less, save and except twenty feet thereof, hereby especially reserved of quartz vein, or gold and silver bearing earth and rock, known and recorded in the Gold Hill mining records, as the Yellow Jacket claim, situate between Gold Hill proper and what was, at the time of the location of said claim, known as the Houseworth claim, in Crown Point Ravine, said location of mining ground, comprising twelve hundred feet, taken up May the 1st, A. D. 1859, the quartz vein or mining ground hereby conveyed, being a portion of said H. B. Camp's interest as one of the
29 original locators of said Yellow Jacket mining claims, the same being in the Gold Hill mining district, county and Territory aforesaid, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges, and franchises thereto, incident, appendant or appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments, and appurtenances thereunto belonging, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, possession, claim, and demand whatever of the said party of the first part, of, in, or to the premises and every part and parcel thereof.

To have and to hold all and singular the premises, with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever. And the party of the first part for himself, and for the said H. B. Camp, and for his heirs, doth hereby agree to and with the party of the second part, and his heirs and assigns, that he has full right and power to sell and convey the said premises for and as the attorney in fact of said H. B. Camp, and that the said premises are now free and clear from all sales or mortgages made or suffered by the said party of the first part.

In witness whereof, said party of the first part has hereunto set his hand and seal the day and year first above written.

H. B. CAMP, [SEAL.]
By his attorney in fact, John J. Musser.

Sealed and delivered in the presence of—
S. F. GILCREST.
W. J. HEATHEN.

30 3d. An instrument in writing, marked "C," in the words and figures following, to wit:

For and in consideration of the sum of nine thousand dollars, to me in hand paid by Erastus Sparrow, of San Francisco, State of California, I, H. Van Horn, of Silver City, Territory of Nevada, hereby bargain, sell, remise, release, and forever quitclaim unto the said Erastus Sparrow, his heirs and assigns forever, all my right, title, claim, and interest, both in law and equity, as well in possession as in expectancy, of, in, and to that certain mining right, title, or property, on that certain vein or lode of rock containing precious metals of gold and silver, and situated in the Territory of Nevada, county of Carson, and described as follows, to wit: An undivided interest of one hundred and eighty (180) feet of quartz vein, or gold and silver bearing rock and earth, known and recorded in the mining records of Gold Hill dis-

trict as the Yellow Jacket claim, situate between Gold Hill proper and Crown Point Ravine, commencing at what was known at the time of the location of said claim as the north line of Houseworth's claim in Crown Point Ravine, running north twelve hundred feet, taken up May 1st, 1859, to have and to hold to him, the said Erastus Sparrow, his heirs and assigns forever.

In witness whereof, I have hereunto set my hand and seal this 8th day of September, A. D. 1861.

HENRY VAN HORN. [SEAL.]

In presence of—
JAMES J. WALKER.
W. R. LINTON.

31 4th. An instrument in writing, marked "D," in the words and figures following, to wit:

Deed.—Van Horn to Jos. Trench.

For and in consideration of the sum of five thousand dollars, to me in hand paid by Joseph Trench of Silver City, Carson County, Territory of Nevada, I, H. Van Horn, of same place, hereby grant, bargain, sell, remise, release, and forever quitclaim unto the said Joseph Trench, his heirs and assigns, all my right, title, claim, and interest, both in law and equity, as well in possession as in expectancy of the said Van Horn, of, in, and to that certain mining right, title, or property on that certain vein or lode of rock containing precious metals of gold and silver, and situate in the Territory of Nevada, county of Carson, and described as follows: An undivided interest of one hundred feet of quartz vein or gold and silver bearing earth and rock, known and recorded in the Gold Hill mining records as the Yellow Jacket claim, situate between Gold Hill proper and what was at the time of the location of said claim known as the Houseworth claim in Crown Point Ravine, said location of mining ground comprising twelve hundred feet, taken up May 1st, 1859, together with all the estate, right, title, interest, possession, claim, and demand whatever that I may have in said premises.

In witness whereof, I have hereunto set my hand and seal this 8th day of September, A. D. 1861.

HENRY VAN HORN. [SEAL.]

In presence of—
JAMES J. WALKER.
W. R. LINTON.

32 5th. A deed from Joseph Trench to Cornelius I. Earton, dated February 10th, 1862, conveying one hundred feet, undivided, of the mining ground in question to said Earton, marked "E."

6th. A deed from Erastus Sparrow to Cornelius I. Earton, dated Feb'y 10th, 1862, conveying one hundred and eighty feet, undivided, of the mining grounds in question to said Earton, marked "F."

7th. A deed from Cornelius I. Earton to Erastus Sparrow and Joseph Trench, dated Feb'y 10th, 1862, conveying two hundred and eighty feet, undivided, being the mining ground in question, to said Sparrow and Trench, marked "G."

After the introduction of said documentary testimony the plaintiffs rested their case.

Defendants' testimony.

Thereupon the defendants, to maintain the issues on their part, offered in

evidence a power of attorney from J. J. Musser to Wm. S. Spear, which said power of attorney was admitted in evidence for the purposes specified in the charge of the court hereinafter set out, subject to all objections as to the legal effect of said instrument, which said instrument is in the words and figures following, to wit:

Power of attorney from Musser to Spear.

Know all men by these presents that I, John J. Musser, of Carson City, Utah Territory, have made, constituted, and appointed, and by these
33 presents do make, constitute, and appoint, William S. Spear, of the same place, my true and lawful attorney for me and in my name, place, and stead, to sell any and all my lots in the town of Carson City, save and except blocks Nos. three, twenty-nine, twenty-seven, and forty-three, lots Nos. 6, 7, 8, 9, and 10 in block 5, and all fronting on Plaza south of Stuvard in block 55, lots Nos. 5, 4, 6, 7, and to make, sign and seal, execute and deliver, and *and* all deeds of conveyance by quitclaim only, to sign my name to any and all instruments, with or without seal, and to deliver the same which may be necessary in and about my business, either private or as att'y-at-law, to ask, demand, sue for, collect, and receive, and receipt for any and all monies or property due to or belonging to me in Utah Territory, to manage, control, sell, or in any way dispose of all my interest in any and all mining claims, either held by me in my own right, or as attorney or agent for these, and generally to do any and every act which I myself might, could, or would do were I personally present, in and about my business or property, of every name, nature, and description, with full power to substitute and revocation, hereby ratifying and confirming any and all the acts of my said attorney in the premises as fully and particular as though I were present at the doing thereof and assenting thereto.

Witness my hand and seal this 12th day of December, A D. 1859.

J. J. MUSSER. [L. S.]

Signed, sealed, and delivered in presence of—

F. M. PROCTOR.

D. L. CROSS.

34 TERRITORY OF UTAH, *County of Carson:*

On the twelfth day of December, A. D. one thousand eight hundred and fifty-nine, before me, F. M. Proctor, a U. S. commissioner in and for said county, personally appeared J. J. Musser, to me known to be the person mentioned in, and who executed the foregoing instrument, and acknowledged that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

Given under my hand this day and year first above written.

F. M. PROCTOR,

U. S. Commissioner, 2nd Judicial Dist., U. T.

2d. Defendants then offered in evidence an instrument of conveyance purporting to be executed by said Wm. S. Spear, as attorney in fact for H. B. Camp, by virtue of said power of attorney from Musser, which deed was admitted in evidence upon the same grounds, and subject to like objections as to its legal effect, as said last-mentioned power of attorney, which said deed so read in evidence is in the words and figures following, to wit:

Deed from Camp, by Spear, to Strong and Hearst.

This indenture, made the thirtieth day of March, A. D. one thousand eight

hundred and sixty, between S. B. Camp, late of Virginia City, Carson County, Utah Territory, party of the first part, and Charles L. Strong and George Hearst party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of thirteen thousand seven hundred and fifty dollars, lawful money of the United States of America, to
35 him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath remised, released, and quit-claimed, and by these presents doth remise, release, and quitclaim, unto the said party of the second part, and to their heirs and assignees forever, all the undivided two hundred and seventy-five (275) feet of, in, and to the Yellow Jacket Co., located in the Gold Hill district, Carson County, U. T., lying adjoining the Gold Hill Co.; and I warrant that I have the right to sell the above-named 275 feet of the said claims. and that the above-named amount of ground belongs to me, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property and possession, claim and demand whatsoever, as well in law as equity, of the said party of the first part of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, their heirs and assigns forever.

In witness whereof, the said party of the first part hath hereto set his hand and seal the day and year first above written.

S. B. CAMP, [SEAL.]
By WM. S. SPEAR,
His Attorney in fact.

Sealed and delivered in the presence of—
A. E. O'NEIL.
P. DANELLIS.

36 STATE OF CALIFORNIA,
County of Sacramento, ss:

On this first day of March, 1860, before me, George E. Montgomery, a notary public in and for the county of Sacramento, personally appeared William S. Spear, known to me to be the person described in and who executed the foregoing instrument of writing, and acknowledged that he executed the same freely and voluntarily, for the uses and purposes herein mentioned, as the attorney in fact of S. B. Camp.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year above written.
[SEAL.]

GEORGE E. MONTGOMERY,
Notary Public, Sac. County.

3d. Defendants then read in evidence an instrument of conveyance similar to the last, purporting to be the deed of H. B. Camp, by W. S. Spear, his attorney in fact, dated March 27th, 1860, conveying twenty-five feet of said Camp's interest in said mining ground to A. E. O'Neil, the same having been also executed by virtue of said power of attorney from Musser to Spear, which said deed was admitted in evidence for the same purpose, and subject to the same objections, as the last.

4th. The defendants then read in evidence sundry conveyances, conveying

portions of the interest of said Strong, Hearst, and O'Neil, so acquired in said mining grounds, to the other defendants answering in the action.

37 The defendants then called J. W. Phillips as a witness, who testified as follows:

I am one of the Yellow Jacket Company; have been since June 4th, 1860; have no interest in the suit; the books produced are the books of the Yellow Jacket Company for 1860; received their book October, 1860; had possession of them till April, 1861; was secretary, treasurer, and superintendent; resigned treasurership and secretaryship, but remained superintendent till March last; books opened April 21st, 1860; are the first books of the company.

The by-laws are admitted for the purpose of showing adverse possession.

By-laws hereto annexed as Exhibit A—[Ins't by-laws as exhibit "A"—See page 60.]

Books show against whom assessments levied, and how paid, paid down to August, 1860. Don't know how much was paid for assessments to present time—perhaps $5 or $6 per foot; these two hundred and eighty feet have been represented since April, 1860, by the parties named in the book, O'Neil, Paxton, Clark, Strong, and other defendants; Clark has generally represented Strong and Hearst's interests; Clark's last assessment was $1 per foot—$70; became interested June 4th, 1860; generally attended meetings; one or two meetings, from June to October, did not attend; never saw Camp in my life; never saw Musser; did not know Musser till last summer; assessments were all paid by parties representing the interests; shaft sunk on claim during period and drift, 55 or 60 feet through rock, and an incline 160 feet; drift in bottom 180 feet; drift in same direction as incline; from bottom of incline run south. Trench first become member of company

38 by purchase from Tilman; first time Trench's name appears on the books of the company is June 1st, 1861; this is another interest of 65 feet which he holds now, except 12½ feet. I met French in meeting before Sept. 8th, 1861, at first meeting after June 1st, 1861.

On cross-examination the witness testified:

Never saw Gilcrest tender any money. Last fall Judge Gilcrest came to a meeting, and stated that he held some title to a claim in Yellow Jacket; at the meeting a motion was made to call list of stockholders, to see if Judge Gilcrest represented any one whose name appeared on the books; if he did he could represent it; all the names were called over, and no name appearing on the book whose interest Gilcrest claimed to represent, he was excluded; I had an impression he claimed to represent 300 feet; he claimed to represent Van Horn for the feet in dispute; the interest claimed for Van Horn was represented by other parties; it was the Musser interest. He was excluded because the books did not show any interest in Van Horn; it was in the summer; he came on two occasions; don't remember, but think it was Saturday of the month; don't think so long as June; it might have been as early. Can't say if he expressed his readiness to pay his assessments at the meeting; he told me he was ready to pay the assessments; it was my duty as an officer of the company to receive them; don't remember that Gilcrest exhibited his deeds; I was not secretary then; I went to see Gilcrest myself after I heard of his titles; he then said he was ready

39 to pay the assessments, but he did not offer the money.

Re-examined.

My impression is it was later than June, but am not certain; his name had never beed on the books; I first heard of this claim about the time of that

meeting; names were called over to see who were members; other instances of same kind have occurred; I never heard of this claim till about that time; can't say whether Trench and Sparrow ever attempted to represent the interest; don't remember that Trench or Sparrow ever objected to Clark representing the interest; attended all meetings but one or two, perhaps, when in California.

Cross-examined.

I found the names of Clark, &c., when the book came into my possession; I don't know how they came there.

Benj. Hoover's testimony.

Benjamin Hoover, on behalf of defendants, testified as follows:

Know Yellow Jacket claims; know them since July 10th, 1859; first meeting of the company was in April, 1860; I was present at the first meeting; had no position in the meeting; I called the meeting to take the contract off my hands; Camp's interest represented by Hearst, Paxton, and O'Neil; don't know whether Strong was there or not; Hearst was there, and Spear was there, and drew up the by-laws; he represented some feet; I attended most of the meetings from that time on; meetings were to be once a month; some meetings omitted, as there was not stock enough rep-
40 resented to hold a meeting; since that time something over seven dollars to the share has been levied; collected assessments on the 180 feet from Clark; attended meetings from June to Sept., 1861; saw Trench at meeting along during the summer of 1861; saw defendants Clark and others while Trench was present; Clark, O'Neil, and Hearst represented this interest; don't know what interest Trench represented; attended meetings last fall, after September; saw Sparrow in the meetings; don't recollect that they made objections to Clark representing the interest; from October to February were at work on the claims, laying track, &c., paying expenses during the period of assessments; Trench attended several, Sparrow two; had a conversation with Trench subsequent to the time, but don't know as anything was said about title; heard him say there was an error in the interest of Camp, and irregular, and there was a mistake on title, and he would take the chances; don't recollect very distinctly.

Cross-examined.

Was at meeting when Trench and Sparrow were present, and did represent Camp's title; was in July or August, I should think; can't say when Trench first attended our meeting; Trench attended meetings after the purchase of the Camp title, I think, but am not certain; I was there when Trench and Sparrow presented their title, but don't recollect that any of the defendants were present, or whether or not it was in public meeting, and demanded to be permitted to represent the interest, but I don't recollect that any of the defendants were present; Trench said he had purchased a part from Van Horn; I remember Sparrow being in meeting, and claiming to repre-
41 sent this interest; I don't know whether Trench and Sparrow ever saw any one pay assessments on the ground; don't remember that Trench or Sparrow tendered assessments; I was present when Gilcrest came, and demanded to be allowed to represent Van Horn's interest; Gilcrest did give notice that he claimed the interest; when Gilcrest gave notice, defendants Clark, O'Neil, and Strong were present; refused to permit him, Gilcrist, to represent Van Horn's interest; Gilcrest appeared some time in the forepart of the summer.

Re-examined.

Mr. Gilcrest did not present any coin so far as I saw. Hearst and Strong had represented the interest for about a year.

Cross-examination resumed.

Strong, O'Neil, and Hearst got their names on the book of the first meeting; don't know how Spear was then. A. E. White and Hammock took contract to run tunnel for one-fourth of the whole claim of Camp, Bishop & Rogers, then to have one fourth of 1,200 feet for running the tunnel. I and Paxton took the contract off their hands about 20th April, 1860. I got in and struck the quartz. I called a meeting of the company to take the contract off my hands; I told them my contract was completed; the members concluded I had fulfilled the contract; Paxton, O'Neill, and Hearst were at the first meeting; contract dated about 10th day of July, 1859. I worked on this contract down to the time of the first meeting; this meeting
42 was in April, 1860. At the organization Clark, Paxton, and O'Neil were present.

Re-examination resumed.

I completed the contract at the time of this meeting; full twelve hundred feet were represented at this time; when I struck the quartz it had no great market value; claims came up to $40 00 a foot in April.

J. G. Paul, a witness for defendants, testified as follows:

I know the Yellow Jacket ground, known it two years; was sec'y of the company. I resigned two months ago, but I am doing the work now.—Trench first appeared June 1st, 1860; he was present at the meeting Saturday, June 1st, 1861; bought 75 feet of Tilman, Sharp, and Stowbridge. Trench represented sixty-two and a half feet during the summer; have attended every meeting of since March, 1861; attended in full; I met Clark, O'Neil, and sometimes Paxton; never met Hearst or Strong. 175 feet of this interest represented by Hearst through Clark; Clark 66 feet, and Coleman through Strong; Clark generally represented all this interest; meeting Dec. 5th, one Oct. 5th, 1861, Sept. 7th one; no meeting January, 1862; December Trench was at meeting, I think, also Sparrow. Sparrow once when Trench was not present, towards spring; Nov. 2d, Trench present, met and meeting adjourned; Mr. Trench came to me as secretary and
43 laid down the money. Said he was prepared to pay assessments; said he had bought the interest; don't recollect that he offered to represent the interest at the meeting, January, 1861; knew the ground; find on the books Clark and Strong, but Clark generally represented it; Gilcrest came to me in the middle of May, 1861, and said he had got a deed from parties to Van Horn of Camp's interest, and wanted me to enter Van Horn's name on the books; I told him I had no authority to transfer the claim, and to come to the meeting. Gilcrist offered to pay the assessments, but did not tender any money; about $1,700 or $1,800 assessments have been made on the interest, a little over $7 00 per foot. I told Gilcrest if the company authorized it I would transfer the interest to him on the books.

Cross-examined.

Gilcrest was at meeting of June 1st, offered assessments on the interest in dispute. At the meeting June 1st, when Gilcrest offered the assessments J. A. Clark was present, and Alex. O'Neil. Gilcrest filed a notice of his

claim; notice presented; can't say that Trench was there before; Trench I think was at this meeting. The notice was handed in to me; I promised to present it to the next meeting; I did not do it; he came and told me what his business was; I told him at the middle of May to come to the meeting. Mr. Gilcrist was a little scared; there were pistols about then; a big fellow, named May had, a quarrel; I think there was something of the kind (the request to represent this interest) refused. Gilcrest had a paper in his
44 hand; said it was a deed from Van Horn. He had papers; think he stated he had a deed and power of attorney; this was in open meeting. Clark was then representing Hearst; Clark also represented Strong.

Re-examined.

Alex. O'Neil said it was a damned thieving operation, and would break Gilcrist's head if he ever spoke to him about it.

Plaintiffs' attorney here read the notice which Paul testified, Gilcrest pretended at the meeting in June 1st, and which he as secretary of the company filed away the papers of the company, in the words and figures following, to wit:

Notice.

"H. Van Horn asks the secretary of the Yellow Jacket Company, Gold Hill, to transfer upon the books of said company two hundred and eighty feet of said claim to his name; he herewith exhibits to the secretary of said company a power of attorney from H. B. Camp, one of the original locators of Yellow Jacket claim, to J. J. Musser, authorizing him to sell said ground, and also a deed from said Musser, as attorney in fact of said Camp, for two hundred and eighty feet of said Yellow Jacket ground, and said Van Horn also tenders all assessments due on said two hundred and eighty feet of said Yellow Jacket Company. Request made by S. F. Gilcrest, agent and attorney for said Van Horn, and on producing power from said Van Horn this first day of June, 1861.

S. F. GILCREST,
Att'y and agent of H. Van Horn.

45 *Statement.*

James F. Rogers testifies, on behalf of defendants and one of the locators of the Yellow Jacket Co.: Knew Camp, saw him last in spring of 1860; just before he left in fall of 1859, had conversations with Camp before he left. No price set upon the claim. Camp has never been here since he left; was well acquainted with him. Knew Wm. Spear was on the way to San Francisco; met Spear at Sacramento.

Testimony of Mr. Webb.

Mr. Webb testified on behalf of defendants:

Knew Camp since 1857; knew he was interested in Yellow Jacket Co.; left in fall of 1859; rec'd a letter in spring of 1860; generally kept letters; have not got this. Jim Long read it, Jim Long answered it. Know Camp's signature; cannot read writing. I did not consider claim worth anything when Camp left.

Testimony of Alex. O'Neil.

Alexander O'Neil, one of the defendants, testified in his own behalf as follows:

I paid $600 00 at San Francisco bank exchange. I saw Hearst and Strong pay some money, don't know how much it was, should judge $2,000 or $3,000; there was no market value at the time in San Francisco; rated here at $8 or $10 a foot; after purchase we organized the claims at meeting. I was elected president of the company. I bought 27th March, 1860; during summer of 1860 work done on shaft; Phillips took hold of it then, in May, 1861; I heard Musser was going to claim it; he heard it in May, 1861. Mr. Gilcrest, I heard, was coming then to represent Van Horn. Seven
46 dollars a foot in all to last assessment has been levied. Saw Trench at meeting, was at the meeting with Trench, met him in the meeting in fall—last fall; never knew that he attempted to represent the interest; assessments were being levied last fall; Clark paid assessments; conversed with Musser about his claiming the interest, but not till May, 1861.

Cross-examined.

Worth about $8 or $10; bought 25 feet in San Francisco, paid $600; I don't know of Trench trying to represent the interest in the company; company voted not to let Gilcrest represent it for Van Horn; he said he wanted to represent the ground; heard Musser was going to claim it after his return from Washington; in May, I think, 1861, I heard it. Had conversation with Musser about his claim in May; can explain why I sent Henning to buy it. Contract for tunnel was to give 300 feet to run the tunnel 100 feet; their contract was in force when Camp left.

Defendants introduced notice in Territorial Enterprise in the words following, to wit, (see notice.)

Defendants read in evidence sections of mining laws hereto annexed as Exhibit "B."

It also appeared that soon after the date of said notice and the date of said power of attorney, hereinbefore set out, from said Musser to Spear, that said Musser went to Washington as member of Congress for the Ter-
47 ritory of Utah, where he remained several months.

Defendants rest.

J. Y. Paul recalled.

Plaintiffs recalled J. Y. Paul, who testified as follows:

Four dollars per foot of the $7 per foot of the assessments which have been levied by said company, was levied since the commencement of this action. $1 10 cents of said assessments was levied between the first of June, 1861, and the commencement of this action, and $2 03½ cents per foot was levied prior to June 1st, 1861. The debits for which the said $4 per foot was levied were contracted from 1st October last, and the greater part before the commencement of this suit.

Gilcrest wanted the ground transferred; the parties claiming the Camp interest were ready to pay their assessments. I told Clark he had better pay his assessments, or Gilcrist and Trench would tender them, and if they should, and they were unpaid, he would have to receive it from them. Trench laid down the money for assessments; it was in $20 pieces.

Plaintiffs, to maintain the issues on their part, offered as a witness J. J. Musser, esq., and the defendants objected to said witness on the ground that he appeared from a power of attorney from H. B. Camp to said Musser, dated Sept. 10th, 1859, before introduced in evidence in the words following, to wit, (see copy of power of attorney from Camp to Mus-
48 ser, hereinafter set out,) and from a deed from H. B. Camp, by said J. J. Musser, his attorney in fact, dated May 15, 1861, to H. Van Horn,

before introduced in evidence by plaintiffs, which deed is in the words and figures following, to wit, (see copy of said deed hereinafter set out,) and the other evidence in the case, that said J. J. Musser is interested in the event of this action, and for that reason incompetent as a witness. The court sustained the objection and refused to permit said Musser to testify, to which ruling the plaintiffs, by their counsel, duly excepted. (See exception on file.)

The plaintiffs then rested, and the foregoing is all the testimony introduced on the trial of said action by either party, except the admission of the plaintiffs that S. B. Camp was intended for H. B. Camp, and was the same person.

And thereupon the court charged the jury in the words following, to wit:

Charge of the court to the jury.

It is conceded that at the time of the execution of the power of attorney to Col. Musser by Camp, the latter had a right of property in the premises in dispute, and it follows, therefore, that he had the right to sell or dispose of it as he saw proper. Camp, then, having the right of disposal of the property, could do so through the assistance of an agent or attorney in fact. Both parties to this controversy claim title to the premises through certain conveyances from Camp. It was well stated by the learned counsel who opened this case for the plaintiffs "that the question submitted for your consideration in this cause was, which of the parties had the better right to the possession in dispute at the commencement of this suit?" And I
49 may say to you, what I have repeatedly stated to other juries in cases involving similar principles, that there is very little of the written law laid down in the books which is strictly applicable to the case at bar. In determining conflicting claims to the possession of mining claims in this Territory, it is proper to inquire carefully into the particular local circumstances by which we are surrounded, the mining rules and regulations of the district in which the claim is situated of equal force with the statutes of the territorial legislature. But in the construction of written instruments, such as the power of attorney from Camp to Musser, the common law rules furnish us with a safe and convenient guide. The principles by which these instruments should be construed cannot be materially varied by surrounding circumstances. The power of attorney there given by Camp to Col. Musser to sell the premises in dispute must be regarded as a personal trust confided by him to Musser as his attorney in fact, and therefore could not be legally delegated to a stranger or third person. For this reason the court decided, in the progress of the trial, that the power of attorney from Musser to Spear conferred no power upon the latter to sell or convey the premises in dispute to the defendants in this action. This ruling of the court is still believed to be the true rule of law, beyond all doubt, for construing the power from Musser to Spear But the court allowed this power to be given in evidence to the jury as testimony tending to show that Spear was placed in the care and possession of this property by Musser, and with authority to do such acts concerning the premises as
50 was or might have been necessary to preserve the property for Camp.

The rules, however, by which written instruments are to be interpreted, and the rules by which the right of possession to real property are to be determined, and matters of very difficult import. In regard to the former, it is most safe and practicable to follow the well-established rules of construction. It must be obvious to the jury, as well as to gentlemen of the legal profession, that a country like ours, where the only estate or interest in land which a man can have is the lowest known to the law, namely, a mere right of possession or occupancy, and where the people in their primary capacity are permitted to make laws regulating this right of posses-

sion, that the rules for deciding their controversies must be modified or varied by the surrounding circumstances. In the old States nearly all the land is owned in fee by individuals as private property. Here the fee simple to every foot of the land is in the government of the United States. There the citizens can make no laws to regulate or determine the rights of possession to lands. Here they make the most important laws on this subject, and such laws are sanctioned by the legislature and enforced by the judiciary. I repeat that here the only right of property in the soil that can be obtained as against the owner of the fee, viz: the United States, is a mere naked possession, a mere tenancy at will or at the sufferance. For the reasons, I say that the rules of law adopted in the States must be varied or modified in their application to cases here involving the right of possession to lands. Therefore, when a controversy arises in your courts in
51 regard to the right of possession to a mining claim, it is to be determined more by plain principles of natural right and justice than by any settled or positive rules of law. So far as this court is concerned, I have determined that in this and like cases the ends of justice shall not be defeated by any of the stern technical rules of the common law, which in other courts and under different circumstances are sometimes said to be hard and inflexible. Having laid down these general rules and principles, which we think should and must govern in these controversies, the question again recurs, which of these parties, plaintiffs or defendants, had the best right to the possession of the premises in controversy at the commencement of this action? It would seem from the testimony that after Col. Musser had received the power of attorney from Camp he was elected as a delegate to Congress, and it became necessary for him to be absent, and he was absent, from the Territory for a considerable length of time attending to his official duties. Under these circumstances Musser executed the power of attorney to Spear, authorizing and empowering Spear to sell the real estate of Musser, with certain exceptions, and clothing Spear with general authority to manage the property held by Musser in his own right, and purporting to clothe Spear with power to sell and convey all property held by Musser as agent or attorney for others, with a power of substitution by Spear. I have already stated that the power of attorney from Musser to Spear confers no authority upon the latter to sell and convey the property in dispute in this case. I have also explained to you the purposes for which this instrument was allowed to be
52 read in evidence. Bearing in mind that the power was only permitted to be read to the jury as evidence tending to show that Musser placed Spear in the care and possession of the property in dispute, with authority to do such acts in relation thereto as were necessary to preserve the property for Camp. It was competent for Col. Musser, before leaving the Territory, to place Spear in the care and possession of the premises for the purpose just stated. Do you believe, then, from all the testimony in the case, that Musser placed Spear in possession and charge of the property? If so, did Spear voluntarily transfer the possession to the defendants? Although Spear possessed no authority under the power of attorney to convey the title or right of possession to the property, he had power to transfer the actual possession. If you believe from the testimony thatSpear had the lawful posesssion of the property from Col. Musser, and that he voluntarily transferred the possession to the defendants or to those under whom they claim, then it becomes important to inquire into the subsequent conduct of Col. Musser in relation to the property in dispute. If you believe from the testimony that Col. Musser stood by after his return from Washington with a knowledge of the pretended sale by Spear, and knowing that defendants were expending their labor and money in developing and improving the property, and further, that he stood by for a considerable length of time

without asserting his right to the property and without disavowing and repudiating the conduct of Spear, he has enabled and assisted Spear
53 to practise a fraud upon the defendants, and the defendants are entitled to a verdict. If you believe, on the contrary, Col. Musser has acted in good faith towards these defendants, that he gave notice within a reasonable time after his return of his claim to the property, or the claim of his principal, and that he took reasonable care to disavow and repudiate the conduct of Spear, then you will find for the plaintiffs.

And thereupon, the plaintiffs by their counsel asked the court to give the jury the following instructions.

Instructions.

1st. That on the pleading in this case the only question is, whether the plaintiffs or defendants have the better title to the property in suit.

2d. That the letter of attorney from Camp to Musser was sufficient in form and effect to empower Musser to execute to Van Horn, the predecessor of plaintiffs, a right to the premises in question, and that the deed from Musser, attorney in fact, &c., to Van Horn, in evidence, is a sufficient conveyance or transfer of the right of Camp to Van Horn, and the subsequent deeds from Van Horn to plaintiffs sufficient to convey to them the title of Van Horn; and that upon this title, so shown, plaintiffs may maintain this action or otherwise. This title is good.

3d. That the power of attorney aforesaid gave no authority to Musser to appoint Spear as the attorney of Camp to sell the claim in suit, and the sale of the premises by Spear to Strong, Hearst, and O'Neil was and is therefore simply void.

54 4th. That upon the facts of this case shown by the proofs, the plaintiffs here are not estopped from setting up the title derived from Camp.

5th. That upon the facts of this case neither the deed to the plaintiffs nor to Van Horn are void because of adverse possession by defendants, but that the same is valid, notwithstanding such possession as the defendants have proved they had of the premises.

6th. The conveyance to Strong and Hearst, and to O'Neil, by Spear as attorney in fact for Camp, introduced in evidence by the defendants, are void for want of authority in Spear, and they passed no interest or title to the mining ground in question to defendant.

7th. The defendants were bound to ascertain the authority of Spear, and no authority in Spear to convey having been shown, they must be presumed to have taken their conveyances from Spear with full knowledge of his want of authority to convey the mining grounds in question.

8th. The defendant taking conveyances from Spear as attorney in fact for Camp, were bound to ascertain his powers, and the powers of attorney from Camp to Musser, and from Musser to Spear, no other authority having been shown, furnished conclusive evidence of his want of power, of which they are bound to take notice.

9th. If said defendants entered upon the ground in question under the conveyances from Spear with the knowledge or the means of knowl-
55 edge of an absence of authority in Spear to convey, they were trespassers.

10th. And being so trespassers, the fact that said defendants levied and paid assessments and expended monies, or made improvements on the claims in question cannot be pleaded as an estoppel by them, when the fact of the title is open and notorious, even though the owners stood by and saw it.

And the court gave 3d, 5th, and 6th of said instructions so asked, and re-

fused to give each of the other of said instructions. To the refusal of each and every one of said instructions the said plaintiffs then and there duly excepted.

The said defendants asked the court to give the following instructions to the jury:

Instructions asked by def'ts.

1st. If the jury believe from the evidence that after the conveyance by Spear to the grantors of the defendants, Hearst, Strong, and O'Neil, that Camp or those claiming under him, either expressed or by implication, abandoned his claim to the possession of the premises, then neither said Camp nor the plaintiffs who claim under him can now assert any right or title to the same, or against the defendants.

2d. If the jury believe from the evidence, that on the 30th day of March, 1860, Wm. S. Spear, being in the actual possession of the premises
56 in controversy, and having no sufficient legal authority, to sell and convey said premises to the defendants or their grantors, assumed to convey, and did convey said premises by deed under an assumed authority as the attorney in fact of said Camp, and that immediately thereafter said defendants or their grantors went into possession under said deed, with the knowledge and consent of said Camp or of his agent and attorney, Musser, and made permanent and valuable improvements thereon with the knowledge of said Camp or said Musser, and that said Camp or said Musser acquiesced in said possession without making any claim of title or right of possession to said premises for the space of fifteen months or thereabouts, and during all that time said Camp and said Musser neglected to pay any assessments or do any work on said premises, so as to save them from forfeiture and relocation under the mining laws of the district where said property is situated, that the said Camp and said Musser are both estopped to set up the title of said Camp against the defendants in this action, and the plaintiffs claiming under said Camp and Musser are equally estopped, and defendants are entitled to a verdict.

Both of which instructions were given by the court. To the giving of each of said instructions the plaintiffs by their counsel then and there excepted.

The foregoing statement is hereby agreed to by the parties.

WILLIAMS, SAWYER & WILLIAMS,
Att'ys for Pl'ffs.
STEWART, KIRKPATRICK & RISING,
J. R. McCONNELL,
Att'ys for Pl'ffs.

57 *Exhibit "A"*—(See copy of by-laws.)

Exhibit "B."—By-laws.

The defendants introduced from the by-laws of Gold Hill district, adopted June 11th, 1859, the following provisions, to wit:

SEC. 15. All persons holding quartz claims shall actually work to the amount of $15 00 to the share, within ninety days from the time of locating.

SEC. 16. All persons holding quartz claims and complying with Sec. 15th, shall hold the same for the term of 18 months, as actual property.

And also from the mining laws of said Gold Hill district, adopted March 4th, 1860, the following sections, to wit:

SEC. 7. All persons holding quartz claims shall work to the amount of three days for each claim in each and every month, in said claim or claims, or work to the amount of fifty dollars, which shall hold said claim for the term of six months.

SEC. 17. All claims located under the old law shall become subject to the revised laws after the expiration of three months from date, as to the working of said claim or claims.

58 *Affidavit of Jos. Trench.*

SPARROW AND TRENCH
vs.
STRONG, HEARST, *et al.*

TERRITORY OF NEVADA,
Storey County, ss:

Joseph Trench, being duly sworn, deposes and says that he is informed by J. J. Musser esq., and believes that said Musser will testify, that he did not know that Spear had assumed to convey the claim of Camp, and his interest in the mining ground in question in this suit, to Strong, Hearst, and O'Neil till after his return from Washington, and did not know that any person was in possession or claimed any interest in said ground as against said Camp, till after his return from Washington as aforesaid; that as he ascertained that such pretended sale had been made, and such claim against Camp set up, came to Virginia expressly to see Strong and Hearst, and other parties, making said claim, in regard to the matters, and did see them, and repudiated said sale, and informed said parties that he should not recognize said sale or the title of said parties; that he informed said parties that he should sell said claim at the first opportunity; that said parties admitted to him that they obtained no title by said sale from Spear; that some negotiations were had with some of said parties for purchasing said Camp's title. The said Musser never did in any manner recognize said sale or acquiesce therein in any manner whatever, but that he set up said claim as soon
59 as he was informed of the condition thereof, and never in any manner relinquished it, and that said Strong, Hearst, and O'Neil, and other parties at that time holding said interest, were informed that he should sell said interest; and that soon after he did sell said interest to Van Horn. And said affiant further says that he was advised by his counsel that said Musser was a competent witness to prove said facts on the part of said plaintiffs, and he relied upon proving said facts by said Musser, and that the exclusion of said Musser from giving his testimony in said cause was a surprise to said plaintiffs.

And said Trench further says that since the trial of this cause he has discovered for the first time that P. H. Clayton, esq., is a material witness for the plaintiffs herein; that he expects to prove by the said Clayton, if an opportunity be afforded him for that purpose, the facts stated in the accompanying affidavit of said Clayton; that said Clayton is a resident citizen of this Territory, residing in the city of Carson, and that he had no reason to believe that said Clayton was cognizant of the facts deposed to by him until after the trial of said cause; that the said Clayton, since said trial, in a casual conversation with the said affiant, communicated to him substantially the facts contained in the said affidavit of said Clayton.

As affiant has no knowledge that said facts detailed in said affidavit were within the knowledge of said Clayton, he did not have said Clayton subpœnaed to testify in respect thereto.

60 Affiant believes the facts stated in said affidavit to be true, and expects if a new trial be granted him to establish the same, and is willing and desirous that said cause be tried by this court at the present or any adjourned term of the same.

JOS. TRENCH.

Sworn to before me this May 22d, 1862.

D. M. HANSON, *Clk.*

Affidavit of P. H. Clayton.

TERRITORY OF NEVADA,
Storey County, ss:

SPARROW AND TRENCH
vs.
STRONG, HEARST, *et al.*

P. H. Clayton, being duly sworn, says that in the spring of 1860 he was called upon by Arch. McDonald, who represented that he had an interest in the ground in dispute from Camp through Spear, and was asked by him as advised to examine the validity of the title.

Upon examination of all the circumstances which clothed Spear with authority to sell, I told him, in my opinion, the sale from Spear to him, Hearst, *et al.*, was a nullity; that subsequently, about the month of April, 1860, I was present at a conversation between Spear and the defendant Hearst and McDonald, when Spear, at the request of the parties, promised to send immediately to Washington City and have J. J. Musser make and execute a deed to them and the parties who held the conveyance from Spear.

P. H. CLAYTON.

WILLIAMS, SAWYER & WILLIAMS,
Attorneys for Plaintiffs.
J. G. BALDWIN.

Subscribed and sworn to before me this 23d May, A. D. 1862.

D. M. HANSON, *Clerk.*

61 *2nd Affidavit of P. H. Clayton.*

1st district court, Storey County.

ERASTUS SPARROW *et als.*
vs.
CHARLES L. STRONG *et als.*

P. H. Clayton, being duly sworn, deposes and says that on the 20th day of May, 1862, the day previous to the day on which the said cause was argued by counsel, and previous to the said plaintiffs closing their testimony in rebuttal and rested their cause, deponent attempted to state to the counsel for the plaintiffs all that he, deponent, knew in relation to the said cause, and the facts thereof; and at said time informed the said plaintiffs, Joseph Trench, all the material points within the knowledge of deponent, and stated substantially in his affidavit attached to the statement of plaintiffs in said cause on motion for new trial. He further says that he was present in the court-room during a part of the said trial.

P. H. CLAYTON.

Subscribed and sworn to before me this 23d day of May, A. D. 1862.

DAVID M. HANSON,
Clerk 1st District Court,
By CHARLES RAWSON, *Deputy.*

62 *Affidavit of Chas. L. Strong.*

1st district court, Storey County.

ERASTUS SPARROW *et al.*
vs.
CHARLES L. STRONG *et al.*

Charles L. Strong, being duly sworn, deposes and says that he is one of the defendants in the above-entitled cause; that he recollects distinctly the time when John J. Musser came to see him in regard to the sale of the said mining ground in dispute herein, by the said Wm. S. Spear, as attorneys in fact for H. B. Camp; at that time the said George Hearst was, and since has been, in the Atlantic States; that in the said conversation the said John J. Musser merely said that he (Musser) thought it was hard for him to have to refund the purchase-money received by Spear from them to the said Camp, and intimated to deponent that he thought that he (Hearst and others) should assist him in making up said amount of money; and the said Musser left deponent under the impression that they would assist him in raising a portion of the money. The said Musser did not repudiate the sale made by said Spear, as attorney for H. B. Camp, to him and others; and the said Musser did not say or intimate that he intended or was going to sell the premises in controversy to any other persons.

This occurred in the fall of 1860. Deponent further says that he has resided at Virginia City constantly since the time of the sale to him and others by the said Spear as aforesaid, and the said Musser said that he would write to said Camp upon the subject, and see them again about
63 it; that said Musser did not say anything further to deponent; that nothing was said by the said Musser that would lead, or did lead, deponent to believe that the said Musser intended to repudiate the said sale made by Spear to him and others.

Deponent further says that since the said sale to him and others that he and the said others have continued to peaceably enjoy the said premises, and pay heavy assessments upon the same, without knowledge of any adverse claim thereto until the said sale to Van Horn.

CHAS. L. STRONG.

Sworn and subscribed this the 24th day of May, 1862.

J. W. NOYES,
Justice of the Peace Virginia Precinct.

Minutes.—Order overruling motion for a new trial.

District court, first judicial district.

SEPTEMBER TERM.—*Thursday, 56th day, Nov.* 13, 1862.

SPARROW AND TRENCH
vs.
CHAS. L. STRONG *et als.*

In this cause it was ordered that the motion for a new trial argued and

submitted at the last term of this court herein, be, and the same is hereby, overruled; to which ruling counsel for plaintiff then and there took their exceptions.

GORDON N. MOTT,
Dist. Judge 1st Dist., N. T.

Certificate of clerk of the 1st Dist. Ct., N. T

64 TERRITORY OF NEVADA,
County of Storey, ss:

I, D. M. Hanson, clerk of the first judicial district court in and for Nevada Territory, do hereby certify that the foregoing transcript contains a full, true, and correct copy of all the pleadings in said cause, of the original statement now on file in said cause for motion for new trial, and all other papers constituting this record, which now remains on file and of record in my office at Virginia City, said county and Territory.

In testimony whereof, I have hereunto set my hand and the seal of said court on this 28th day of Nov'r, 1862.

[L. S.] D. M. HANSON, *Clerk said Court.*

65 *Writ of error.*

TERRITORY OF NEVADA:

ERASTUS SPARROW AND JOSEPH TRENCH, plaintiffs,
vs.
CHARLES L. STRONG, GEORGE HEARST, ALEXANDER E. O'NEIL, ROBERT PAXTON, JOSEPH CLARK, H. THOMPSON, JOHN HENNING, JOHN O. EARL, L. W. NEWELL, and H. H. RAYMOND, defendants.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the of the supreme court holden at Carson City in and for the Territory of Nevada, greeting:

Because that in the record and proceedings and also in the rendering of judgment in a suit before you or some of you, between Erastus Sparrow and Joseph Trench, plaintiffs in error, and Charles L. Strong, George Hearst, Alexander E. O'Neil, Robert Paxton, Joseph Clark, H. Thompson, John Henning, John O. Earl, L. W. Newell, and H. H. Raymond, defendants in error, in a civil action brought to recover the possession and for the restitution of an undivided two hundred and eighty feet in length, being an equal undivided 280–1200 part of that certain quartz ledge, lead, or vein of gold and silver bearing rock and auriferous and argentiferous earth,
66 together with all the dips, spurs, and angles of said ledge, lode, vein, rock, or earth, located and situated in the Gold Hill mining district, in the county of Storey and Territory of Nevada, described as follows, to wit: That quartz vein or gold and silver bearing earth and rock known and recorded in the Gold Hill mining records as the Yellow Jacket vein or claim, situated between Gold Hill proper and what was known at the time of the location of the said claim as the Houseworth claim in "Crown Point Ravine;" said mining ground comprising twelve hundred feet in length on the vein, including all its dips and spurs, commencing at the northern line of said Houseworth claim on said vein or ledge, and running thence northerly along and upon said ledge twelve hundred feet, including twenty-five

feet of surface on each side of the ledge or vein, being the same ground or claims taken up and located on or about the 1st day of May, A. D. 1859, by H. B. Camp, John Bishop, and J. F. Rogers, said two hundred and eighty feet of the ground hereinbefore mentioned and described being a part of the said interest or claim held by the said H. B. Camp as original locator, and by him, by John J. Musser his attorney in fact, conveyed to H. Van Horn, and costs taxed in the court below at one hundred and one dollars and twenty-five cents, together with costs in the said supreme court of the Territory of Nevada taxed at two hundred and four dollars and eighty-two cents, a manifest error has intervened, to the great damage of the said
67 Erastus Sparrow and Joseph Trench, the said plaintiffs in error, as in their complaint has been stated. And as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then under your seal you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States on the first Monday of December next, at Washington, being the seat of the national government, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Roger B. Taney, chief justice of the said
[L. S.] Supreme Court, as Washington aforesaid, the 14th day of August, in year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-seventh.

J. McC. REARDON,
Clerk Supreme Court Nevada Territory.

Filed Aug. 14th, 1863.

J. McC. REARDON, *Clerk.*

68 *Assignment of errors.*

United States of America, Supreme Court, December term, 1863.

ERASTUS SPARROW AND JOSEPH TRENCH, plaintiffs,
vs.
CHARLES L. STRONG, GEORGE HEARST, ALEXANDER E. O'NEIL, Robert Paxton, Joseph Clark, H. Thompson, John Henning, John O. Earl, L. W. Newall, and H. H. Raymond, defendants.

Assignment of errors.

Afterwards, to wit, on the first Monday of December, A. D. 1863, at the December term of said Supreme Court, before the chief justice and associate justices of the same, at the city of Washington, in the District of of Columbia, came the said Erastus Sparrow and Joseph Trench, by their attorneys and say that in the record and proceedings in said cause, and also in giving judgment therein, there is a manifest error in this, to wit: That it appears from said record that the said supreme court of said Territory refused to reverse the judgment and the order of the district court of the first judicial district of said Territory refused a new trial of the issues in said cause, whereas by the law of the land the said supreme court ought to have reversed the said judgment and order of the said district court, and

ought to have remanded the said cause back to the said district court
69 for a new trial of said issues of fact, because—

1st. The verdict of the jury in said district court, and the judgment of the court thereon, were contrary to law.

2nd. Said verdict was against evidence.

3d. There was no proof before said district court and the said jury that the said H. B. Camp ever conveyed the premises in dispute to the said defendants or those through whom they claim title.

4th. There was no proof before said district court and the said jury that the said Wm. S. Spear, under whose deed defendants claim had any authority from said H. B. Camp to deed the said premises.

5th. There was no proof before the said district court and said jury that the said H. B. Camp ever ratified the said pretended sale by said Wm. S. Spear of said premises, either by himself or by his attorney in fact, J. J. Musser.

6th. There was no proof before said district court and said jury that the plaintiffs in error, or those through whom they claim title, ever abandoned said premises.

7th. There was no proof before said district court and said jury of any intent to defraud said defendants, or those through whom they claim title title in the purchase of said premises.

70 8th. It appears from said record, affirmatively, that the said plaintiffs in error were in the actual possession of said premises, and that they obtained their title to said premises from the said H. B. Camp, by a good and sufficient deed of conveyance.

There is error also in this, to wit, that the supreme court of the said *supreme court of the said* Territory of Nevada refused to reverse the judgment of the said district court, and remand the cause back for further proceedings, because the said district court refused to give to the said jury the following instruction asked by the said plaintiffs to be given to said jury:

"1st. That on the pleadings in this case the only question is whether the plaintiffs or defendants have the better title to the property in suit."

There is error also in this, to wit, that the said supreme court of the said Territory of Nevada refused to reverse the judgment of the said district court, and remand the cause back for further proceedings, because the said district court refused to give to the said jury the following instructions asked by the said plaintiffs to be given to said jury:

"That the letter of attorney from Camp to Musser was sufficient in form and effect to empower Musser to execute to Van Horn, the prede-
71 cessor of plaintiffs, a right to the premises in question, and that the deed from Musser, attorney in fact, etc., to Van Horn, in evidence, is a sufficient conveyance or transfer of the right of Camp to Van Horn, and the subsequent deeds from Van Horn to plaintiffs sufficient to convey to them the title of Van Horn, and that upon this title so shown plaintiffs may maintain this action; if otherwise, this title is good."

There is error also in this, to wit, that the said supreme court of the said Territory of Nevada refused to reverse the judgment of the said district court, and remand the case back for further proceedings, because the said district court refused to give to said jury the following instruction asked by the said plaintiffs to be given to said jury:

"That upon the facts of this case shown by the proofs, the plaintiffs here are not estopped from setting up the title derived from Camp."

There is error also in this, to wit, that the said supreme court of the said Territory of Nevada refused to reverse the judgment of the said district court, and remand the case back for further proceedings, because the said

district court refused to give to said jury the following instructions asked by the said plaintiffs to be given to said jury:

"The defendants were bound to ascertain the authority of Spear, and no authority in Spear to convey having been shown, they must be presumed to have taken their conveyance from Spear with full knowledge of his
72 want of authority to convey the mining ground in question."

There is error also in this, to wit, that the said supreme court of the said Territory of Nevada refused to reverse the said judgment of said district court, and remand the said cause back for further proceedings, because the said district court refused to give said jury the following instructions asked by the said plaintiffs to be given to said jury:

"The defendants, taking conveyances from Spear as attorney in fact from Camp, were bound to ascertain his powers of attorney from Camp to Musser and from Musser to Spear; no authority having been shown furnished conclusive evidence of his want of power, of which they were bound to take notice."

There is error also in this, to wit, that the said supreme court of the said Territory of Nevada refused to reverse the said judgment of said district court, and remand the said cause back for further proceedings, because the said district court refused to give to said jury the following instruction asked by the said plaintiffs to be given to said jury:

"If said defendants entered upon the ground in question under the conveyances from Spear with the knowledge of an absence of authority in Spear to convey, they were trespassers."

73 There is error in this also, to wit, that the said supreme court of the said Territory of Nevada refused to reverse the said judgment of said district court, and remand the said cause back for further proceedings, because the said district court refused to give to said jury the following instruction asked by the said plaintiffs to be given to said jury:

"And being so trespassers, the fact that said defendants levied and paid assessments, and expended moneys or made improvements on the claims in question, cannot be pleaded as an estoppel by them when the fact of the title is open and notorious, even though the owner stood by and saw it."

There is error also in this, to wit, that the said supreme court of the said Territory of Nevada refused to reverse the said judgment of said district court, and remand the said cause back for further proceedings, because the said district court gave to said jury, at the request of said defendants, the following instruction, to which the plaintiffs duly excepted:

"If the jury believe, from the evidence, that after the conveyance by Spear to the grantors of the defendants Hearst, Strong, and O'Neill, that Camp, or those claiming under him, either expressly or by implication, abandoned his claim to the possession of the premises, then neither said Camp nor these plaintiffs, who claim under him, can now assert any right or title to the same as against the defendants."

74 There is error also in this, to wit, that the said supreme court of the said Territory of Nevada refused to reverse the said judgment of said district court, and remand the said cause back for further proceedings, because the said district court gave to said jury, at the request of said defendants, the following instruction, to which the plaintiffs duly excepted.

"If the jury believe, from the evidence, that, on the thirtieth day of March, 1860, William S. Spear, being in the actual possession of the premises in controversy, and having no sufficient legal authority to sell and convey said premises to the defendants or their grantors, assumed to convey, and did convey, said premises by deed under an assumed authority, as the attorney in fact of said Camp, and that immediately thereafter said defend-

ants, or their grantors, went into possession under said deed, with the knowledge and consent of said Camp, or his agent and attorney, Musser, and made permanent and valuable improvements thereon with the knowledge of said Camp or said Musser, and that said Camp and said Musser acquiesced in said possession without making any claim of title or right of possession to said premises, for the space of fifteen months or thereabouts; and during all that time said Camp and said Musser neglected to pay any assessments or do any work on said premises, so as to save them from forfeiture and relocation under the mining laws of the district where said property is situated, that then said Camp and said Musser are both
75 estopped to set up the title of said Camp against the defendants in this action, and plaintiffs claiming under said Camp and Musser are equally estopped, and defendants are entitled to a verdict."

There is error also in this, to wit, that the said supreme court of the said Territory of Nevada refused to reverse the judgment of the said district court, and remand the cause back for further proceedings, because of the exclusion by said district court at the trial of said cause of the witness J. J. Musser, offered by said plaintiffs in error.

C. H. S. WILLIAMS,
J. G. BALDWIN,
Of counsel for plaintiffs in error.

Endorsed: Filed Aug. 14, 1863.

J. McC. REARDON, *Clerk.*

76 *Petition for citation.*

TERRITORY OF NEVADA:

ERASTUS SPARROW AND JOSEPH TRENCH, plaintiffs,
vs.
CHARLES L. STRONG, GEORGE HEARST, ALEXANDER E. O'NEIL, ROBERT PAXTON, JOSEPH CLARK, H. THOMPSON, JOHN HENNING, JOHN O. EARL, L. W. NEWELL, and H. H. RAYMOND, defendants.

Petition for citation.

To the Honorable George Turner, chief justice of the supreme court of the Territory of Nevada:

The petition of Erastus Sparrow and Joseph Trench, plaintiffs in error in the above-entitled cause, respectfully represents that on, to wit, the 21st day of May, A. D. 1862, at a term of the district court in and for the county of Storey, in the Territory of Nevada, begun and holden on the 5th day of May, A. D. 1862, a judgment was rendered by said district court against your petitioners, and in favor of the defendants in error, Charles L. Strong, George Hearst, Alexander E. O'Neil, Robert Paxton, Joseph Clark, H. Thompson, John Henning, John O. Earl, L. W. Newell, and H. H. Raymond, for
their costs in said action taxed at one hundred and one dollars and
77 twenty-five cents; that thereupon your petitioners, plaintiffs in error, moved the said court for a new trial, which motion was, on the 13th day of November, 1862, of the September term, by the court overruled, to which ruling exception was by your petitioners taken, and an appeal from such order taken to the June term of the supreme court of the said Territory, begun and holden at Carson City, on the — day of ——, A. D. 1862, for the reversal of said order, and that afterwards to wit, on the 16th day of March, A. D. 1863, the said supreme court gave and rendered judgment in said

cause, affirming the order of said district court with costs taxed at two hundred and four 82-100 dollars; that upon the — day of ——, A. D. 1863, your petitioners filed with the clerk of said supreme court a petition for a rehearing of the said appeal before said supreme court, which petition was, by an order entered in said court upon the 23d day of July, A. D. 1863, denied.

Your petitioners further represent, that they had sued out a writ of error to the Supreme Court of the United States, for the reversal of the judgment of the said supreme court of the said Territory of Nevada, and that they have taken the steps necessary to remove the record and proceedings in said cause to the said Supreme Court of the United States, at the term of said court to be begun and holden on the first Monday of December, A. D. 1863.

Wherefore, in consideration of the premises, your petitioners pray
78 your honor, 1st, that a citation be issued by your honor to the said defendants in error, in manner and form provided by law; and 2nd, that your honor approve the bond presented by the plaintiffs in error, as required by the statute in such cases made and provided.

As in duty bound, your petitioners will ever pray, &c.

C. H. S. WILLIAMS,
J. G. BALDWIN,
Of counsel for plaintiffs in error.

Endorsed: Filed Aug. 14, 1863.

J. McC. REARDON, *Clerk.*

Affidavit of Horace Smith and Geo. D. Keeney.—Value of property in dispute.

Territory of Nevada, supreme court.

ERASTUS SPARROW AND JOSEPH TRENCH,
vs.
CHARLES L. STRONG, GEORGE HEARST, ALEXANDER E. O'Neil, Robert Paxton, Joseph Clark, H. Thompson, John Henning, John O. Earl, L. W. Newell, and H. H. Raymond, def'ts in error.

Horace Smith and George D. Keeney, being duly sworn, depose and say that they are acquainted with the value of the property in dispute in the above-entitled action, and that the same exceeds in value the sum of two thousand dollars exclusive of costs.

HORACE SMITH.
GEO. D. KEENEY.

Subscribed and sworn to before me this 14th day of August, A. D. 1863.

J. McC. REARDON,
Clerk Supreme Court.

Filed Aug. 14, '63.

Citation on writ of error.

79 TERRITORY OF NEVADA:

ERASTUS SPARROW AND JOSEPH TRENCH, plaintiffs in error,
vs.
CHARLES L. STRONG, GEORGE HEARST, ALEXANDER E. O'Neil, Robert Paxton, Joseph Clark, H. Thompson, John Henning, John O. Earl, L. W. Newell, and H. H. Raymond, defendants in error.

To Charles L. Strong, George Hearst, Alexander E. O'Neil, Robert Paxton,

Joseph Clark, H. Thompson, John Henning, John O. Earl, L. W. Newell, and H. H. Raymond, greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Nevada, wherein Erastus Sparrow and Joseph Trench are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. George Turner, chief justice of the supreme court
80 of the Territory of Nevada, this 24th day of August, in the year of our Lord one thousand eight hundred and sixty-three.

GEO. TURNER,
Ch'f Jus. Sup. C'rt, N. T.

TERRITORY OF NEVADA, *Storey County:*

I, W. H. Howard, sheriff of said Storey County, do hereby certify that I served the above citation upon one of the def'dts in error, C. L. Strong, and upon Wm. M. Stewart, of counsel for said defendants, by reading this writ and delivering to each of them a copy thereof, at this county, on the 31st day of August, A. D. 1863.

W. H. HOWARD,
Sheriff of Storey County, N. T.

Filed September 1st, 1863.

ALFRED HELM, *Clerk.*

Order fixing bond.

Supreme court of Nevada Territory.

TRENCH AND SPARROW, appl'ts,
vs.
C. L. STRONG *et al.*, resp'dts.

On appeal from the district court of the first judicial district Storey County.

On application of the attorneys for appellants, it is ordered that the bond on appeal from this court to the Supreme Court of the United States be, and the same is hereby, fixed at five thousand dollars.

Aug. 21st, 1863.

GEO. TURNER,
Chief Justice of said supreme court.

Filed Aug. 21st, 1863.

ALFRED HELM, *Clk.*

81 *Bond on appeal to the Sup. Court of the U. S.*

Know all men by these presents that we, Erastus Sparrow and Joseph Trench, as principals, and George Plaisted and George A. Hudson, as sureties, are held and firmly bound unto Charles L. Strong, George Hearst, Alexander E. O'Neil, Robert Paxton, Joseph Clark, H. Thompson, John Henning, John O. Earl, L. W. Newell, and H. H. Raymond, their executors, administrators, and assigns, in the full sum of five thousand dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

In witness whereof, we have hereunto set our hands and seals this twenty-fourth day of August, A. D. 1863.

The conditions of the above obligation are such that whereas the said Charles D. Strong, George Hearst, Alexander E. O'Neil, Robert Paxton, Joseph Clark, H. Thompson, John Henning, John O. Earl, W. L. Newell, and H. H. Raymond, obtained a judgment against the said Erastus Sparrow and Joseph Trench, in the surpreme court of this Territory of Nevada, on the sixteenth day of March, A. D. 1863, on an appeal from the district court of the 1st judicial district, in and for Storey county, Nevada Territory; and whereas the above-bounden Erastus Sparrow and Joseph Trench are desirous of taking said case to the Supreme Court of the United States upon a writ of error:

Now, therefore, if the said Erastus Sparrow and Joseph Trench shall well and truly prosecute the said writ of error to pay and answer
82 to the defendants in error all damages and costs, if they fail to make good their plea, or if the said writ be withdrawn or dismissed, then and in such case the obligation to be null and void; otherwise, to remain in full force and virtue.

Dated Virginia, N. T., August 24th, A. D. 1863.

ERASTUS SPARROW, [L. S.]
By his attorney in fact, Jos. Trench.
JOS. TRENCH. [L. S.]
GEORGE PLAISTED. [L. S.]
GEO. A. HUDSON. [L. S.]

TERRITORY OF NEVADA,
County of Storey, ss:

George Plaisted and Geo. A. Hudson, whose are subscribed to the foregoing undertaking, being severally duly sworn, depose and say that they are severally worth double the sum of five thousand dollars, the sum in said undertaking specified as the penalty therein, over and above all his just debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this 24th day of August, A. D. 1863.
[SEAL.] WM. L. CROWELL, *Notary Public.*

Endorsed: Approved and filed August 25, 1863.

ALFRED HELM,
Clerk Sup. Court, N. T.

83 Supreme court.

TERRITORY OF NEVADA, *ss:*

I, Alfred Helm, clerk of the supreme court in and for said Territory, do hereby certify that the foregoing is a full, true, and correct transcript of the original record in the foregoing entitled cause, which was heretofore duly certified and came up on appeal from the district court of the first judicial district to the supreme court of Nevada Territory, together with the writ of error, assignment of errors, petition for citation, citation, affidavit of value of property, order fixing amount of bond, and the bond on appeal, as the same now appear on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court, at Carson City, N. T., this 29th day of February, A. D. 1864.
[SEAL.]

ALFRED HELM, *Clerk.*

Filed November 25, 1864.

U. S. Supreme Court,

DECEMBER TERM, 1866.

ERASTUS SPARROW & JOSEPH TRENCH,

IN ERROR,

against

CHARLES L. STRONG, and others.

Writ of Error to the Supreme Court of Nevada Territory.

BRIEF FOR THE PLAINTIFFS IN ERROR.

CHAS. O'CONOR,
G. T. CURTIS,

Of Counsel for Plaintiff's in Error.

New-York:
SACKETT & MACKAY, BOOK AND JOB PRINTERS,
No. 46 PINE STREET, COR. WILLIAM.

1866.

U. S. Supreme Court.

DECEMBER TERM, 1866.

No. 107.

ERASTUS SPARROW and JOSEPH TRENCH,
Plaintiffs in Error,
against
CHARLES L. STRONG, and others.
Defendants in Error.

Writ of error to the Supreme Court of Nevada Territory.

BRIEF FOR THE PLAINTIFFS IN ERROR

ON PRELIMINARY QUESTIONS AS TO JURISDICTION AND PRACTICE.

This cause has been before the Court at a former Term, on a motion to dismiss; one of the grounds of which motion was that the judgment of the Territorial Supreme Court, now brought into this Court for review and reversal, was an affirmance of an order of an inferior Court overruling a motion for a new trial. This Court, after hearing this point elaborately argued, held that the judgment of the Supreme Court was not an affirmance of an order of the inferior Court overruling a motion for a new trial; that it did not purport at all to be an affirmance of an order overruling a motion for a new trial; but that the plain import of its terms is, that it affirmed a general judgment for the defendants in the action. Hence, it was held by this Court that the judgment of the Supreme Court is one which can be reviewed in this Court by writ of error, and the motion to dismiss was denied. (Sparrow *vs.* Strong, 3 Wallace, 105.)

The point then, in relation to the plain import and effect of the judgment of the Territorial Supreme Court, is *res adjudicata.*

Inasmuch, however, as the judgment that is to be rendered in this Court, on this writ of error, may involve an inquiry into the precise character of the errors committed by the Territorial Supreme Court, and, as the record that came before that Court appears to have been *brought there* by an appeal from an order of the District Court overruling what was denominated in the practice of that Territory a "motion for a new trial," we proceed to show that, so far as respects our right to have a reversal of the judgment of the Supreme Court, it can make no difference whether the appeal from the proceeding, called a motion for a new trial, did or did not authorize the Supreme Court to act on the general judgment of the District Court.

We suppose, however, that the appeal from the District to the Supreme Court did authorize the latter to act on the general judgment rendered for the defendants in the action; and that having so acted, this Court can redress all errors affecting the judgment affirmed, that are patent on the record. For, we think it manifest that there is a broad and plain distinction between the proceeding, denominated in the Code of Practice of this Territory *a motion for a new trial*, coupled with the provisions for regulating the appeal from an order overruling such motion, and the ordinary motions for new trials in courts governed simply by the practice of the common law. We agree entirely with this Court that "The circumstance that the *discretion* was exercised under a peculiar statute by an appellate Court, and on appeal, cannot withdraw the case from the operation of the principles which control this Court," in refusing to act on the exercise of *discretion* by inferior Courts. But we suppose that if a statute authorizes a proceeding, by way of motion for a new trial, with the plain intent of bringing under review, in the same Court, and at the same time, all errors of law which have affected a general judgment, and then authorizes an appellate Court, on appeal from

that proceeding, to hear the whole merits of the action, on a statement of the case, and to act on the general judgment of the inferior Court, and the appellate Court does so act; the proceeding is not one addressed to the mere *discretion* of either Court. It performs a double office. As to matters of discretion it is addressed to its discretion. On exceptions duly taken in law, it is addressed to its judicial duty and obligation to decide rightly. And the fact that such a proceeding is called *a motion for a new trial* is not to overcome the plain intent and purpose of the statute. We proceed, therefore, to the first preliminary point, which we have to submit to the Court.

I.

THAT THE PROCEEDING UNDER THE NEVADA CODE, CALLED THEREIN A MOTION FOR A NEW TRIAL, IS A SPECIAL METHOD OF REVIEW, INTENDED TO REACH THE VERDICT AND THE JUDGMENT RENDERED IN AN ACTION, AND TO BRING THE LATTER UP FOR REVISION IN THE COURT IN WHICH IT WAS RENDERED; AND THAT THE APPEAL FROM AN ORDER OVERRULING SUCH AN APPLICATION IS INTENDED TO CARRY INTO THE APPELLATE COURT, FOR ITS REVISION, THE MERITS OF THE JUDGMENT OF THE INFERIOR COURT, AND TO ENABLE THE APPELLATE COURT TO ACT UPON THAT JUDGMENT.

Our view of this proceeding is, that it is intended (as a mode of review of a general judgment) for an alternative method, with like efficacy and effect with an appeal from such general judgment or a writ of error, and more convenient and more likely to be embraced, because it unites in the same proceeding relief to be given in respect to the weight of evidence, or newly discovered evidence, and relief to be given on account purely of erroneous rulings of law. That it unites these two grounds of relief, can constitute no solid objection to the re-examination in this Court of the pure questions of law contained in a record made under such statute provisions,

and brought here by Writ of Error. That such is the character of this proceeding we now proceed to show.

The Act of Congress, organizing this Territory, committed to the regulation of the Territorial Legislature the whole subject of "Writs of Error, Bills of Exceptions and *appeals*" from the Territorial District Courts to the Supreme Court of the Territory.

Act of Congress, March 2, 1861, § 9.
12 Stat. at Large, p. 212.

Under this authority the Territorial Legislature did regulate this subject in its Code of Practice, adopted Nov. 29, 1861.

1 Laws of Nevada Territory, pp.314 to 435.

It was certainly competent to the Territorial Legislature, under the broad authority conferred upon it, to provide any *form* of appeal from the District to the Supreme Court, and to give that form any scope and effect that it saw fit.

The Territorial Code of Practice in civil cases does not prescribe or recognize a common law Bill of Exceptions; and it does prescribe and recognize a different mode of excepting to the rulings of a Court at the trial of an action. It also provides three modes of bringing errors of law under review after a verdict and *judgment;* one of which is called a motion for a new trial. The Code recognizes but one *form of civil action*, which it makes the same at law and in equity. It is instituted by complaint. Code of Practice, title I., p. 314. But the distinction between suits at law and suits in equity is not abolished.

Issues are either of law, or of fact. If of fact in an action at law, there may be a trial by Jury.

When there is a trial of issues to a Jury, the Court is required to state to them all matters of law necessary for their information in giving their verdict, and to furnish to the parties a statement in writing of the points of law contained in the charge, or to sign at the time a statement of such points prepared and submitted by the counsel of either party. (§ 165, p. 341.)

This is not a *Bill* of Exceptions according to the Statute of Westminster, but something quite different, and obviously intended as a substitute therefor. That it is so intended is apparent from the definition of an exception given in § 188; namely, "an objection taken at the trial to a decision upon a matter of law."

It may be taken for the future purpose of a motion for a new trial, or for the future purpose of an appeal. (§ 188.) It may be delivered in writing to the judge, or written down by the clerk; or it may be noted on the Judge's minutes, and afterwards *settled* in the "statement of the case" provided by the Code. (§ 189.) "No particular *form* of exception shall be required." (§ 190.)

After a verdict, "judgment" is to be entered by the clerk in conformity therewith, within twenty-four hours after the verdict, (§ 197,) and a "judgment is the final determination of the rights of the parties in the action." (§ 144.)

"Final judgments" in the *District* Courts may be reviewed on appeal to the *Supreme* Court, by appealing from the "final judgment" rendered in an action commenced in the District Courts, or brought there from another Court; and an "order" overruling a motion for a new trial may also be appealed from. (§ 285.) Both are intended to reach the final judgment of the District Court.

An appeal from the "final judgment" of course opens the whole merits of the judgment. An appeal from an "order" overruling a motion for a new trial may do this, and it also has a function beyond; it may open the whole merits of the judgment, and bring under review incidental errors not properly reviewable on direct appeal from the judgment alone. It may open only questions of fact, addressed to the discretion of the Court, or it may open questions of law, addressed to the legal obligation of the Court to decide rightly on the law, according as the "statement of the case," and the motion for a new trial did or did not include questions of law. This is apparent from §§ 188, 189, 190, 191; 193, 194, 195; 271, 275, 276, 277, 278, 279, 280, 281, 282,

283; 285; 291. Hence it appears that it was not true in the Courts of this Territory, that motions for new trials necessarily involve *only* questions addressed to the discretion of the Court. They *may* involve matters of discretion—as the weight of evidence, or newly discovered evidence; or they *may* involve rulings of law, or they may involve *both*, according as the "statement" and the "exceptions" are made up.

An appeal, therefore, from an order overruling a motion for a new trial *may* bring into the Appellate Court a record which shows erroneous rulings of law; and if the order overruling the motion for a new trial is final in its nature, reaffirming, or leaving operative the general judgment previously rendered on the verdict, it is the proper subject of an appeal; and if it be founded in whole or in part, on rulings of law at the trial, duly excepted to, the appeal from it necessarily opens the merits of the general judgment, in respect to the exceptions so taken.

The mode of making up the proper record for an appeal from such an order overruling a motion for a new trial, is the following:

1. The Judgment Roll.
2. A statement of the grounds of the motion; which may include "error in law, occurring at the trial, and excepted to by the party making the application." (§ 193.). From this provision it is apparent that the exception taken at the trial, for error of law, is expressly authorized to be put into the motion for a new trial.
3. A notice of the appeal, with the proper bond, &c.
4. A statement of the case containing the grounds of the appeal, which may be agreed by the parties. (§§276–279.) And if the motion for a new trial in the court below assigned "error of law," such "error of law" may be embraced in the "statement of the case," to be used on the appeal.

It thus appears, clearly, that an appeal from an order overruling a motion for a new trial, may include and bring up errors of law, as well as matters purely discretionary, and that the motion for a new trial, and the appeal from an order denying it, are the proper modes for correcting such errors of law.

However unusual such provisions may be, if made by a positive code, they overcome the objection, that the denial of a new trial cannot be considered here, *because* the motion also *involved* mere matters of discretion.

The Code provides that upon an appeal from any judgment or order, the Appellate Court may reverse, affirm or modify the judgment or *order* appealed from, *in the respect mentioned in the notice of appeal.* (§ 283.)

Did, then, the judgment rendered by the Supreme Court, on the order appealed from, affirm the general judgment of the District Court, in favor of defendants? and was it competent to the Supreme Court so to act on that general judgment?

In order to determine this, it is necessary to see: (1) What the order appealed from *was.* (2) What it was competent to the Supreme Court to *do.* (3) What the Supreme Court *did.*

1. The order appealed from was an order refusing to open and vacate the merely formal *general judgment*, entered by the clerk; for, although the application is called, and is in form, a motion for a new trial, yet it expressly demanded that the general judgment be vacated; and "the statement of the case on appeal" shows that this demand was made mainly, or, at all events, in part, upon exceptions duly taken at trial, on points of law. This is in accordance with the provisions of the Code, cited *infra et supra.*

2. On this appeal, it was competent to the Supreme Court "to reverse, affirm or modify" the order appealed from, *in the respect mentioned in the notice of appeal*, and to set aside, confirm or modify any proceeding *subsequent to* or *dependent upon* the order; and, if *necessary* (or proper), *to order a re-hearing.* (§ 283, Code.) Now "the respect mentioned in the notice of appeal," com-

prehended exceptions in law, duly taken at the trial, affecting the legal merits of the general judgment, as appears from the "statement of the case," and which demanded that the judgment should be vacated. Again, the Supreme Court might have deemed it *necessary* to order a re-hearing, and would have done so, if convinced that the District Court had erred in matters of law. Thus the whole matter of the general judgment of the District Court was before the Supreme Court, to be affirmed or set aside.

3. The Supreme Court, undoubtedly, did what it was competent to do, *i. e.*, it affirmed the general judgment of the District Court; and did it upon a view of "all and singular, the law and premises" brought before it in the "statement on appeal."

This Court has already said in this case (3 Wallace, 105) that the judgment of the Supreme Court affirmed the judgment or decree of the District Court, and that the only judgment or decree in the record is the judgment for defendants in the action.

Now all this, so far as it related to "all and singular the law," was not an exercise of *discretion* by the Supreme Court. It was in the regular discharge of its judicial obligation to act on matters *ex debito justitiae*, and its error, so far as it acted "on all and singular, the law," was not an error of discretion, but an error of law.

It will perhaps be argued, that in all courts, motions for new trials may involve questions of law, but that if they do, it is well settled that a refusal to grant a new trial is not a subject of review in this Court by writ of error. But the distinction which is to be regarded is this, whether the decision involved matters *ex debito justitiae*, or only matters of discretion. When a statute or code of practice *specially provides* for a review of questions of law, it is not the discretion of the Court which is invoked; but its judicial duty to give a correct decision on a point of law is addressed; and the appeal that is allowed is then not an appeal from the discretion of the inferior Court, but an appeal from its erroneous ruling of law.

This record is entirely in accordance with the Code of Practice; and the appeal carried into the Supreme Court of the Territory, the judgment given for the defendant in the District Court, with an exception duly taken at the trial, and also with other questions of law, and prayers for instructions, embraced in the "statement of case," annexed to the judgment roll. That it also carried into the Supreme Court of the Territory questions relating to the weight of evidence or to newly discovered evidence, affords no objection to the consideration by *this* Court, of the questions of *law* arising at the trial, and there duly raised by exception, and clearly and distinctly embraced in the "statement of case," on which the Supreme Court of the Territory must have acted in affirming the judgment of the District Court. It is only such errors of law that are now assigned as "Errors" in *this* Court.

This record contains:

1. The Judgment roll (of the District Court) consisting of
    1. The pleadings.
    2. An exception taken at the trial to the ruling on the competency of a witness.
    3. The verdict for defendants.
    4. The general judgment of the District Court, for defendants, May 22d, 1861.
2. The notice of appeal from the order of the District Court refusing a new trial, made November 13th, 1862, with the proper undertakings, &c.

This is followed by a stipulation signed by the parties, making the same paper used in the District Court as the grounds of the motion for a new trial, the "*settled statement on appeal* to the Supreme Court of the Territory." The statement is fully set out after the stipulation, and it embraces as errors—

The Exception to the rejection of plaintiffs' testimony taken at the trial and overruled.

The Prayers for instructions asked by plaintiffs and refused, duly excepted to.

The Prayers for instructions asked by Defendants and given, duly excepted to.

Other errors of law in the general charge to the jury also excepted to.

The "statement of case" (p. 10, Record) shows that the application, by motion in the District Court, prayed that the general judgment which had been rendered in the action be vacated; and consequently an order overruling this application of necessity *affirmed* the general judgment.

3. The judgment of the Supreme Court of the Territory, affirming the judgment of the District Court. (See 3 Wallace, p. 98.)
4. The Writ of Error from this Court to the Supreme Court of the Territory, removing the Record.
5. The assignment of Errors for this Court, filed when the Writ of Error was sued out.

Whatever errors of law this record discloses, which must have entered into the judgment of the Supreme Court of the Territory affirming the judgment of the District Court, *this* Court can review.

It is no answer to this, to say that the appeal was taken from a motion for a new trial; because, (1) A motion for a new trial in the court rendering the general judgment is one mode, expressly provided by the Code, for bringing again under examination in the same Court any errors of law which affected the general judgment. (2) Because an appeal to the Supreme Court of the Territory from the order overruling such motion for a new trial is another mode expressly provided for correcting the errors of law which the District Court did not correct.

It can constitute no valid objection, that this kind of proceeding is *called* a *motion for a new trial.* It is in truth and in express intendment of the Code a special method of *review*, comprehending both *questions of law* and *questions relating to the weight of evidence*, and the only inquiry to be made *here* is, whether,

1. The questions of law were duly raised by the record in the District Court for a vacatur of its own judgment?
2. Whether the same questions of law were duly carried by the appeal into the Supreme Court of the Territory, for *its* revision of the judgment of the District Court?

The following are some of the points by which this statutory proceeding, under the Nevada Code, is plainly distinguishable from a motion for a new trial in Courts in which such motions are regulated by common law practice alone.

1. It is made after judgment in the action; whereas by common law practice a motion for new trial must be made before judgment.

   § 197 of the Code positively directs judgment to be entered by the Clerk within twenty-four hours after the verdict, unless there is a stay of proceedings. (In this case the verdict was rendered May 21, 1862, and the judgment of the District Court was entered May 22, 1862).

   § 195 allows five days after trial to prepare the statement of case on which the party aggrieved means to apply for a new trial.

2. Under this prescribed practice, in granting a new trial, the Court must necessarily vacate the judgment already entered. In Courts of

mere common law practice, a motion for a new trial acts only on the verdict.

3. Under the mere common law practice, an application for a new trial can not be carried beyond the Court in which the action is tried. This Nevada Code gives an appeal.

4. Under the mere common law practice, a motion for a new trial need not embrace a formal statement of the case. Under this Nevada Code, the paper on which the motion is to be made is directed to be made up in a certain form, comprehending, if the party making it intends to appeal, a statement of the case.

5. On an appeal from an order overruling this statutory motion for a new trial, if the judgment rendered in the court below is not within the reach of the appellate Court, the latter Court can not vacate it by the fiat by which it orders a new trial; for if the appellate Court grants a new trial, without ordering the judgment to be vacated, an application for this latter purpose must be made in the Court below. To obviate this, and to put the judgment within the reach of the appellate Court, is the purpose of § 283.

6. § 284 directs that the appeal from an "order" shall be heard on the papers used in the hearing of the Court below. In the paper used in this case in the Court below, afterwards converted into the settled statement on appeal, there was an express prayer that the judgment be vacated.

But if we are mistaken in regard to the intended purpose and statutory effect of the proceeding called a

motion for a new trial, and if the rule which prevents this Court from re-examining motions for new trials is so imperative, that it cannot regard the statutory effect of this proceeding, then we say:

II.

THAT THE SUPREME COURT DID ACT ON THE GENERAL JUDGMENT OF THE DISTRICT COURT, AND DID AFFIRM THAT JUDGMENT, WITHOUT AUTHORITY, AND WHEN IT ONLY HAD AUTHORITY TO AFFIRM OR REVERSE AN ORDER OVERRULING A MOTION FOR A NEW TRIAL: AND FOR THIS ERROR, IF IT WAS ONE, WE ARE ENTITLED TO A REVERSAL OF THE JUDGMENT ENTERED IN THE TERRITORIAL SUPREME COURT.

It is impossible to construe the judgment entered by the Supreme Court as a mere affirmance of the order of the District Court overruling the motion for a new trial. Either the Supreme Court rightly supposed—as we suppose—that the appeal from the order brought before it the general Judgment of the District Court for reversal or affirmance, or else it committed an error; for it made no order or decree in direct reference to the order overruling the motion for a new trial, but proceeded directly to the general judgment of the District Court, which was the only judgment in the record before it, and *affirmed* it. If the Supreme Court had intended to act only on the order appealed from, it would simply have dismissed that appeal, or have affirmed in terms the order appealed from. It did not act on the mere order, but acted on the judgment brought before it in the record; and if the plaintiffs in Error had never prosecuted this Writ of Error, the defendants must in all time have found their final evidence of title to this property in this record of the Supreme Court of the Territory, affirming the judgment of the District Court by which the claim of the plaintiffs was negatived.

We say, therefore, contingently, that if the Territorial Supreme Court had not such a regular possession of the

record brought up from the District Court, as would authorize it to pronounce the judgment which it actually gave and caused to be entered, then, for this very reason, its judgment is erroneous and must be here reversed: because,

1st. If the Supreme Court, on the appeal from an order overruling the motion for a new trial, could only act on that order and affirm or reverse *it*, the plaintiffs, by an affirmance of the *judgment* of the District Court, were cut off from their right of appeal from that judgment, and from their Writ of Error, both of which are given by the Code. (§ 285, §§ 302 *et seq.*)

2d. The reversal here of the erroneous judgment of the Supreme Court is the only relief the plaintiffs in Error can have; and the Act of Congress of February 27, 1865, § 8, makes the Supreme Court of the *State* of Nevada the successor of the Supreme Court of Nevada Territory, as to such cases as the present, "with full power to hear and determine the same." This reversal, therefore, is of great importance to the plaintiffs in Error; for on such reversal it would become the duty of the State Supreme Court to complete the proceedings opened for completion by such reversal. (13th Statutes at Large, p. 441.)

If a judgment is irregularly affirmed, this Court will reverse the judgment of the affirming Court, although that Court could not have reversed the judgment of its inferior Court.

Davis *vs.* Packard, 6 Peters, 41.
S. C. 7 Peters, 276.
S. C. 8 Peters, 312.

If a record brought to this Court shows that the Court from whose judgment it comes acted finally on a case that was *coram non judice*, this Court will reverse that final action, and send

the case down with directions to have the case placed in its proper attitude.

Mordecai *vs.* Lindsay, 19 Howard, 199.

Under the Act of Congress of February 27, 1865, § 8, the proper attitude for this case will be to direct the Supreme Court of the State to "hear and determine" it, after reversing the judgment of affirmance entered in that Court, and the judgment of the District Court which was affirmed; for this is a right expressly reserved to the plaintiffs in Error by that statute.

Freeborr *vs.* Smith, 2 Wallace, 160, 175.

Let us suppose, for the purpose of following out the effect of this statute, that this Court should be of opinion that the judgment of the Supreme Court, now here by this Writ of Error, ought to be affirmed. The District Court of Nevada Territory no longer exists. How, then, are the defendants in Error to get their execution of the judgment in the action? It remains to be executed, and it was a judgment for costs. It can only be executed, by sending a mandate from this Court to the State Supreme Court, directing that Court to award execution; and this the Act of Congress above cited clearly contemplates and provides for. On the other hand, let us suppose that this Court should be of opinion that the judgment of the Supreme Court of the Territory ought to be reversed. This Court has expressly repudiated the suggestion that the defendants can have a vested right to hold their judgment, because the Court in which it was rendered was abolished, after this Writ of Error had brought the judgment here. Something then remains to be done; and the Act of Congress provides what is to be done; namely, a "mandate of execution or *of further proceedings*" is to be sent from this Court to the State Supreme Court, on which latter Court the act confers "full power to hear and determine the same," namely, the case, and "to award mesne or final process thereon."

Freeborn *vs.* Smith, 2 Wallace, 160.

III.

IT CAN CONSTITUTE NO VALID OBJECTION TO THE EXAMINATION BY THIS COURT OF ANY ERRORS OF LAW DISCLOSED BY THIS RECORD, THAT IT CONTAINS NO SEALED BILL OF EXCEPTIONS, OR THAT THE PROCEEDING BY WHICH THE WHOLE CASE WAS AFTER JUDGMENT ENTERED, BROUGHT UNDER REVIEW, FIRST IN THE DISTRICT COURT, AND THEN IN THE SUPREME COURT, WAS DENOMINATED IN THE PRACTICE OF THOSE COURTS A MOTION FOR A NEW TRIAL.

We shall probably be met by the case of Pomeroy's Lessee *vs.* The Bank of Indiana, 1 Wallace, 592, and we therefore proceed to distinguish this case from that, and to show on the authority of that case that we are entitled to a full examination here of all the errors of law disclosed by this record and duly excepted to, according to the practice of the Code, before the judgment of the District Court was entered. As to the separate error, *if it was one*, on the part of the Supreme Court, in affirming a judgment of the inferior Court not regularly before it, no exception need to have been taken. It is an error, *if it be one at all*, patent on the record now here.

1st. As to a *sealed* Bill of Exceptions. Pomeroy's Lessee *v.* The Bank of Indiana undoubtedly does re-affirm what was previously well settled, that in the *Circuit Courts* of the United States an exception, to be available here, must be according to the Statute of Westminster, namely, it must be taken and drawn out before judgment, and must be *sealed*. In that case, neither of these requisites had been complied with. In this case, every ruling complained of is certified to have been duly excepted to at the time it was made, and the presumption therefore is, that it was put into all the *form* which the Code contemplates, before the judgment was entered, although the excepted rulings were not embodied in a "statement of the case," until after the judgment. The sole question here, therefore, relates to a *seal;* and the actual question presented is, whether this Court is bound, or authorized,

to insist that a *sealed* Bill of Exceptions, shall come up from a Territorial Court, whose practice, regulated by statute enacted by competent authority, has not only not adopted the Statute of Westminster, in this particular, but has made express provisions that are inconsistent with the requirement of a *seal.*

The Nevada Code just as clearly excludes the requirement of a *seal* to a Bill of Exceptions, as the Code of the State of New-York excludes it.

Nevada Code, § § 165, 188-191.
New-York Code, § 264.

The former expressly provides that "no particular *form* of Exception shall be required." The latter expressly says that an Exception shall "*not be sealed or signed.*" Both Codes require the Exception to be *taken* at the proper time, and point out how the evidence that it was taken shall be preserved; but under neither Code can the Judge, either before or after the judgment, be compelled to *seal* it. In deciding the present case therefore, this Court is called upon to say, either that the decision in Pomeroy *vs.* The Bank extends to Writs of Error to *all* Courts, even though their statutory practice excludes the requirement of a *sealed* Bill of Exceptions, or to limit the ruling to Courts where the Statute of Westminster is of binding force. Now we do not understand the decision above cited to hold that the practice of this Court calls for a sealed Bill, because a Court of Error cannot discharge its functions without one, but it requires it because, and only because, the law and practice of the Court from which the Record comes, makes it a prerequisite to the right of the party complaining to have its judgment reëxamined either in the same Court or elsewhere. The language and reasoning of this Court clearly point to this distinction; and if they did not, it has now become obviously necessary for this Court to make it plain, that where a statutory practice excludes the provisions of the Statute of Westminster, and provides any substituted mode of making rulings of law intelligible on the record of its own local Court of review, this Court will and must examine those rulings, on Writ of Error.

2. This case contains, spread upon the record, an agreed statement, filed in the District Court, and made a part of the record removed by the appeal into the Supreme Court, which answers all the requirements of the ruling in Burr *vs.* Des Moines Co., 1 Wallace, 99, and Pomeroy's Lessee *vs.* The Bank of Indiana, same volume, p. 592. Those requirements are, *first*, that the statement shall be signed by the parties and be spread upon the record so as to be a part of it; *second*, that it must not call upon the Court to weigh evidence or draw inferences of facts, but so far as it states facts, it must state them, like a special verdict, in such a way as to call only for the application of the legal principles which must determine the case.

Beyond all doubt this statement conforms to these requirements. It is true that it was originally prepared as the grounds of a motion for a new trial; but it was made by stipulation, the "settled statement on appeal to the Supreme Court," and under that stipulation was spread upon the record. It is also true, that it embraces affidavits prepared to be used as a *part* of the grounds for asking a new trial. But all that part of it is here mere surplusage; and as the plaintiffs in Error do not complain here of any acts of mere discretion, but solely of rulings of law duly excepted to at the trial, and as the agreed statement shows with perfect distinctness how every question of law was applied, as it arose, to the facts as they were developed on the trial, or to the absence of evidence tending to show any suggested fact, this Court is not called upon to do anything but to apply the law to the rulings comprehended in the case stated, precisely as it would if this narrative from below was in the form of an English Bill of Exceptions brought into the Supreme Court of the Territory by Writ of Error. In presenting the merits of this case, the plaintiffs in Error have no occasion to look at all into the affidavits that related to newly discovered evidence; and as to everything that took place during the trial, this Court is furnished with the means of determining the correctness of the instructions given or refused, without

having to find a single fact or draw a single inference in relation to a fact.

3. The two foregoing positions being, as we submit, entirely clear, we say, thirdly, that there is nothing in the previous decisions of this Court, or in the principles on which they rest, which should make it either legally necessary or judicially expedient, or fit, for it to say, that it cannot examine errors of law thus plainly spread upon the record and duly excepted to, because they were placed in the record by a proceeding *called* an application for a new trial. The sense and substance of the rule which makes such applications ordinarily not reëxaminable in a Court of Error, is, that they involve matters "resting *entirely* in discretion." This is the language of this Court in Pomeroy *vs.* The Bank, and the previous cases; and it accurately expresses the reason of the rule. But that rule does not, we submit, extend to decisions of inferior Courts, where the Court was called upon, by the very frame of the record, to act on matters *ex debito justitiae;* and where the obvious intent of a *statute proceeding* was to invoke the judicial duty of the Court, and it has been invoked in vain.

4. There is some reason to suppose that the Act of Congress of February 27, 1865, § 8, intended that this Court should hear and determine any Writ of Error upon any record from the Supreme Court of Nevada Territory, sued out before July 1, 1866, in which errors of law are apparent. The language of the statute is "*all* Writs of Error," "upon *any* record." It was passed after the Supreme and District Courts of the Territory had ceased to exist. Congress may well be supposed to have taken notice of the fact, that there might be cases thus situated, in which, under the peculiar practice of those Courts, various methods of spreading erroneous rulings of law upon the record, would be found to exist. Such cases, if they were to fail of being heard and determined here on their merits, on account of a merely technical defect in the record, could not have that difficulty removed by a dismissal of the pending Writ of Error and the issue of a new one, or by a suggestion of diminution to bring up

a more complete record, the Courts from which such more complete record might otherwise come being abolished. The very government, of which they were a department, is utterly annihilated. This consideration may have operated with Congress, and may have led to the comprehensive directions of this statute, which clearly import a direction to this Court to hear any case upon any record from the Supreme Court of the Territory disclosing merits, and to send down such a mandate of further proceedings as would govern the Supreme Court of the State in hearing and determining the case upon the merits disclosed by that record. For example, the Territorial Supreme Court, in this case, affirmed a general judgment of the Territorial District Court. It may have done so on an appeal from that judgment, or on an hypothetical Writ of Error, or on an order overruling a motion for a new trial, all of which are methods of review provided by the Code. Yet no new Writ of Error from this Court, and no suggestion of diminution could now bring up a record showing the appeal, or the hypothetical Writ of Error, or the means by which the Supreme Court held itself authorized to affirm the judgment of the District Court when acting on the order refusing a new trial, for both of those Courts are abolished. At the same time, there is a record now here, which discloses the merits of the judgment, and fully enables this Court to direct justice to be done. Is that justice to fail, because this record may be defective, according to a strict common law test? Against that result, we appeal to the Act of Congress above cited.

We have presented above certain of the prominent and characteristic distinctions between the Nevada proceeding, called by its Code a motion for a new trial, and a motion for a new trial under the practice of the common law, which practice never existed in Nevada. But as this subject has wider relations, both retrospective and prospective, we add an illustration of its bearings,

which we deem it highly important to present to the attention of this Court.

IV.

Absolutely, unqualifiedly, and without any single excepted case, the Common Law of England forbade a review of any decision denying a motion for a new trial. Hence, our lawyers and Judges treat it as a maxim, that the decision on a motion for a new trial is not a subject of review by Writ of Error.

And this maxim furnishes to the defendants in Error, the curt apothegm in which they seek to turn the plaintiffs in Error out of Court, without a hearing.

But, since the plaintiffs in Error came here from Nevada, and not from Great Britain, this Court will, at the least, reflect for a moment before applying this foreign law to their case.

The phrase "motion for a new trial" is only used in the English or American nomenclature, to describe an application to the Court in which the first trial was had. There is in England no class of motions in the Court of first instance, which are, in fact, motions for a new trial, and are yet reviewable on Writ of Error in an appellate Court. But *in American practice there is a class of motions for a new trial in the Court of first instance, which* ARE *so reviewable.*

This is, of course, in every instance, by virtue of some statute of the particular State. But, in some instances and, perhaps, in most instances, *the review does not receive the name of an appeal from an order denying a new trial..*

The difference in the phraseology of legislative enactments being taken into view and clearly understood, it will be at once apparent to any intelligent mind, that, under the various and anomalous methods of practice introduced by statute in the various States and Territories of our country, there are, relatively to the right of review in an appellate Court, two classes of motions for a

new trial, whilst in the English Common Law there was only one.

The motion for a new trial for newly discovered evidence, that the verdict was contrary to evidence, or for any causes other than those which, according to the statute of Westminster might be made the subject of an *Exception*, form, in American practice, one class: the motion for a new trial on Exceptions form the second class. *This second class is wholly unknown in the English practice.*

States of this Union which adhere most closely to the English course of procedure allow no review in the first class. *Every State, as well as every Territory, allows a review in the second class.*

We will proceed to illustrate these views:

1. That a common law Court of review cannot look at a refusal to grant a new trial, is indeed a fundamental maxim of English judicial practice. On Writ of Error for Error in law, nothing was before the Court but the record, properly so called, of the judgment; *i. e.* the pleadings, &c. The Bill of Exceptions, to review Errors in law not appearing of record, was given by the Statute of Westminster, 13 Edw. I.. ch. 31. Though thus given by statute in the mother country, the Bill of Exceptions came to us in our colonial condition as common law, and is not to be regarded differently by us from other parts of the English common law.

At the time of our separation from the mother country and until very recently, if indeed such be not still the law of England, a Bill of Exceptions could not be taken for any other purpose than for presentation to a Court of Appeal on Writ of Error. *The Court in which it was taken could not look at it.*

The motion for a new trial in the Court of original jurisdiction, of which we read so much in the books of the English common law, is made, not upon a Bill of Exceptions, but upon the Judge's report, a copy of his notes, affidavits, or the like.

Of course, the common law never had any machinery

for bringing these things before a Court of review. Nothing could be more simple, elementary and absolutely true in the English common law than that there could never be, on Writ of Error, a review of an order denying a motion for a new trial.

Nay, more. If a party took a Bill of Exceptions at *Nisi Prius*, the Court *in banc* would not hear him on a motion for a new trial, unless he waived his Bill of Exceptions. So, we repeat emphatically, that a motion for a new trial in the Court of first instance is not reviewable on Error. If anything in mere judicial practice can be on called fundamental, this was in England a fundamental principle.

Bacon's Abridg. Bill of Exceptions, p. 526. *Kerr's Action at Law, A. D.*, 1853, *reprinted in the Phila. Law Library, vol.* 83, *pp.* 295 *to* 300, *side paging.*

All that is above stated on this point is neatly and distinctly set forth by Mr. Kerr and proven on authority. Every word of it is familiar to every Attorney in England, and to almost every Attorneys' clerk.

A word more may be profitably said touching the English practice in its naked simplicity, as it exists in the land of its birth. In every common law Court of review, up to the very highest, the Writ of Error opens the whole record for review. Every error apparent was reviewed; it was always quite immaterial, whether the error had been presented to or considered by the Court *a quo* the record came. This, too, is familiar law. But for a citation, we refer to the celebrated reversal in O'Connell's case. The Lords found in the record one bad count among many good ones. There was no motion in arrest in the Court below. The attention of the Judges below had not been called to this defect. If it had been, it is manifest that they would have given judgment on the good counts only. (See pp. 219, 230, and especially Lord Campbell's remarks, pp. 419, 420).

O'Connell *et al. vs.* The Queen.
11 Cl. and Finelly, 155 to 425.

2. In order to present the closest American parallel,

we now pass from this statement of the English common law practice, to the common law practice of an old State, one of the original thirteen; and which, adhering until 1848 with as much rigor as any other to the English practice, had a system of Courts modelled *precisely* on the English judicial department. We mean the State of New-York. We refer to this State for the purpose of showing that during its strict common law *regime* prior to 1848, it long acted in its Court of last resort on a practice which was, *by express statutory enactment*, in nineteen common law cases out of twenty, nothing but a review on Error of a motion for a new trial.

The New-York House of Lords or Court of last resort, was, first the Court for the correction of Errors and afterwards the present Court of Appeals. By the constitution of that Court it could consider no error, however palpable and flagrant, that was not actually brought under the consideration of the Court below. No defect in what is called in the English practice *the Record*, could be seen in that Court, unless brought under the actual consideration of the Court below, by a demurrer to pleadings, a motion in arrest of judgment, or the like.

Colden *vs.* Knickerbocker, 2 Cowen, 48.
Addington *vs.* Allen, 11 Wend., 380, 387, 421.

The great majority of Appeals to a Court of review at common law, arise on a Bill of Exceptions for Error in rulings at the trial. Now, we have seen that at the English common law, a Bill of Exceptions was never looked at in the Court of first instance. How, then, under the New-York system, was a Bill of Exceptions to come under review, in the Court of last resort?

And here, let it be observed, that the New-York Courts always adhered to the English practice, as rigidly as their statutes would permit. The Supreme Court would not hear a *general* motion for a new trial, on a *case* presenting the various grounds allowable on that motion in a Court of first instance, unless, according to the English practice, the party would waive his Bill of Exceptions.

Corlies *vs.* Cummings, 5 Cowen, 415.

The only way in which relief was had from this piece of rigor in adhering to English precedent, was this: Sometimes the parties stipulated that a case might be turned into a Bill of Exceptions, and most generally this apparent agreement was coerced by the Judge at Circuit. In their rules of practice, adopted by the Judges, January 1, 1830, this was prohibited. (See Rule 37.)

But this rule of Court was rendered ineffectual by the cotemporaneous revision of the New-York statutes.

2 Rev. Statutes of N. Y., p. 422, § 76, first edition

This revision provided that "A Bill of Exceptions shall not prevent the argument of a motion to set aside the verdict, on the ground that such verdict was against evidence; but such motion shall be argued either before or after the decision of the Court on the Bill of Exceptions, as the Court shall direct."

Most motions for a new trial, not founded on errors of law reviewable on Bill of Exceptions, through the medium of a Writ of Error, are based on the ground that the verdict is against evidence. It will, therefore, be seen that this section 76 of the Rev. Stats. of 1830, swept away, in nearly every instance where either could be operative, not only the Supreme Court Rule 37, of 1830, but the long settled common law practice, imported from England, that a party shall not retain his Bill of Exceptions and yet move for a new trial on a case. In their notes on this section 76, the New-York Revisors of 1830 state, that such was its object.

3 Revised Statutes of N. Y., Second Ed., p. 744.
Note on Original § 81, enacted as § 76.

It is not of much interest in this investigation; but it is a fact, that the present New-York Code, preserves this precise practice. It merely requires that, preparatory to going to the Court of Appeals, the matter inserted in the *case*, for the purposes of the *general* motion for a new trial be expurgated, leaving

nothing in the case but the Exceptions, and the statements necessary to the Exceptions.

N. Y. Code of Practice, § 264.
See Voorhee's 8th Edition. Editor's sub-division 3, of this section, and his note to it, as part 3.
See, also, Zabriskie *vs.* Smith, 1 Kernan's N. Y. Reports, p. 480; points 3 and 4, in syllabus, or head note.

It then remains to inquire how did the general mass of common law litigation ever reach the New-York State Court of last resort, and become subject to its jurisdiction?

The only process for going up was a Writ of Error. In nineteen cases out of twenty, no question arises in the Court below, on the record proper; by the common law the Court below would not look at the Bill of Exceptions, and by the constitution of the Court of Appeals, it would look at nothing which had not been actually considered *at bar and in banc* by the Supreme Court.

Here certainly would seem to be an inextricable puzzle produced by certain special variances from the English judicial practice, *let into* the frame-work of the New-York system, as one might say, whilst the rest of the New-York practice remained in conformity with the English practice.

Another New-York statute cured all this; and, as will presently be seen, placed the whole subject precisely on the footing on which it stands under the Nevada Code. By an act of March 30, 1809 (5 Webster and Skinner's Laws of N. Y., p. 569, section 5, re-enacted 1 N. Y. R. L. of 1813, p. 319, sec. 4) it was enacted as follows:

IV. *And be it further enacted*, That no issue in any civil cause shall hereafter be tried at the bar of the said Court, without the leave of the said Court, for that purpose, first had and obtained: And further, That when a Bill of Exceptions shall be taken on the trial of any issue, joined in any cause in the Supreme Court of this State, it shall be the duty of the Justice who puts his seal thereto for a witness, to return the same bill into the said Court, at the next term thereof, who shall proceed to judgment, according to the same Exception, as it ought to be allowed or disallowed, and may grant a

new trial thereon, in their discretion; and the said Bill of Exceptions, together with the said judgment thereon, shall be made matter of record: *Provided always*, That nothing herein contained, shall be construed to affect the right of bringing a writ of error on such judgment, which Writ of Error shall be a stay of all proceedings from the bringing thereof, in the same manner, and on the same terms, as a Writ of Error is now a stay of proceedings.

It will thus be seen that at least ever since 1809, every plaintiff in Error in the State of New York, who carried a common law case to the State Court of last resort, unless he had demurred to the pleadings, or moved in arrest in the Court below, presented to the judgment of the highest State Court, by means of his Writ of Error, NOTHING *but a prayer to set aside an order of the Supreme Court denying a motion for a new trial.*

Under the Nevada practice, a party might appeal from the judgment; *i. e.*, the mere formal judgment, if he saw fit; but if there was no fault in that, an appeal was useless, and he might confine himself to an appeal from the denial of his motion for a new trial. So under the New-York practice, he might or might not, as he saw fit, render his writ of error operative to bring up *for review* the *judgment* below. But if he made it operative no further than to bring up the denial of his motion for a new trial, as in nineteen cases out of twenty was the course, are we to suppose that a Writ of Error would not have lain to this Court from the judgment of the highest State Court, under the 25th section of the judiciary act, on a question properly arising and presented at the trial? Could it be said in every such case that the judgment of the highest State Court was not "final," on the ground that the mere formal judgment on the pleadings entered *by the Clerk* in the Court of first instance, was not for the purpose of review before the highest State Court.

1 U. S. Stat. at Large, p. 85. § 25.

To put this illustration more exactly and clearly, let us suppose either

1st. That New-York had always been a territory under an organic law like that of Nevada Territory, under which this Court had plenary appellate jurisdiction; or

2d. That Nevada, instead of its Code, had, in one line, adopted the judicial practice of New York, as it existed January 1, 1848, before the New York Code.

In either case, would this Court have no jurisdiction to review final decisions of the local Court of last resort, where there was no demurrer to pleadings and no motion in arrest, but only a rehearing on a Writ of Error, in the Court of last resort, of a motion for a new trial on Bill of Exceptions?

We think a negative answer cannot be given to this question.

Hilliard on the Law of New Trials, p. 6, § 7, informs us, that in other states, besides New-York, it is an indispensable pre-requisite to being heard in the Court of last resort, that the party should move for a new trial in the Court of original jurisdiction. *See his note* 6, *to this page.* He says: "if no motion for a new trial be made in the Court below, neither the action of the Court [at the trial], in giving or refusing instructions, or admitting or excluding evidence * * will be considered by the [appellate] Court."

The cases cited by the learned CHIEF JUSTICE, in denying this motion to dismiss this Writ of Error (3 *Wallace*, 105, *foot note*), as well as all the numerous analagous citations which might have been added, are cases of Writs of Error to this Court from judgments rendered in a Circuit Court of the United States, sitting in a State, and organized under the judiciary act. No one of them was on a Writ of Error to a State Court, issued under the 25th section of the judiciary act; nor was any one of them on a Writ of Error to a Territorial Court under the plenary appellate jurisdiction given to this Court by the uniform course of the Territorial organic laws.

It will be seen, therefore, that in all these cases, the common law, "pure and undefiled," as it came to us from our British progenitors, governed the decision. In these cases, nothing could have been looked at in this Court, save and except only *the record*, as that word

is understood in English practice, and the Bill of Exceptions taken in conformity with the statute of Westminster, bearing the *seal* of the Judge below, and purporting on its face to have been actually *sealed at the trial.*

Walton *vs.* U. States, 9 Wheaton, 657.
Ex parte Roadstreet, 4 Peters, 107.

In a word, the law of this Court and of the Courts *a quo*, as to the matter now in hand, was precisely the same as the English common law. No new time-saving or labor-saving devices came under review, which had been sanctioned and made binding by competent legislative authority.

We have carefully examined all these cases. We think no one has been overlooked, and we affirm that this statement of their origin and nature is strictly correct.

Observations will be made on some of them, which may tend to clear up the matter.

1. Of course, *in these cases*, the Court never looked at any thing but the *sealed* Bill of Exceptions, unless, indeed, there be, as hereafter suggested, one instance to the contrary.

   The way in which this Court came to have intruded upon its notice the motion made below for a new trial, was this: In the Bill of Exceptions, where, under the practice of England and of the United States Courts, it could have no legitimate place, a motion for a new trial was inserted, and an exception to the denial thereof.

   The Court always disposed of this *foreign* matter, as it should by analogy in this case. It overloooked and disregarded the whole of it, and confined its attention to the exceptions to rulings on the law actually appearing to have been taken at the trial.

   a. They in *Doswell* vs. *De La Lanza*, 20 *How.*, 32, cited by CHIEF JUSTICE CHASE in 3 *Wallace*, 105, *note*, the Court refused to re-

consider the motion for a new trial on the merits which was made below; but proceeded to consider exceptions taken at the trial, allowed one of them, and reversed the judgment. This is a characteristic specimen of a large mass of cases.

b. The just, yet law-observing liberality of the Court, in dealing with this topic, is well exemplified in another case, which we will cite, as the representative of a class entitled to all respect and honor.

In Blunt's Lessee vs. *Smith*, 7 *Wheat.*, 249, Mr. WHITE, Counsel for the defendants, at *p.* 267, thus stated his "preliminary objections—The attention of the Court ought to be directed to the only Bill of Exceptions which was tendered in, or signed by the Circuit Court. By that it would appear, that no exception whatever was taken to the instructions given to the Jury, at any time *before* the verdict was rendered. If the plaintiff was dissatisfied with the charge, that dissatisfaction ought to have been expressed immediately; remaining silent until the rendition of the verdict, was a waiver of any exception which might have availed the party, if it had been taken immediately. The first error assigned, as to the charge, is upon a motion for a new trial, after the refusal of which the Bill of Exceptions was tendered and signed. Whether the Court decided correctly or not in refusing the new trial, is a point which this Court will not revise, as has been so well settled that it would only be a waste of time to refer to decisions in support of this statement."

The Court, by CHIEF JUSTICE MARSHALL, thus responded, at p. 272:

"After a verdict in favor of the defendants, the Counsel for the plaintiff moved for a new trial, which was refused. To the opinion of the Judge, overruling the motion for a new trial, and also to his charge to the Jury,

the plaintiff excepted, and the cause comes on now to be heard on his exceptions.

"It is well settled that this Court will not revise the opinion of a Circuit Court, either granting or rejecting a motion for a new trial; but the exception to the charge of the Judge, although taken after a motion for a new trial, may have been, and probably was, reserved at the time the charge was given, and will, therefore, be considered.

c. Another case, by its nearer approximation to the case now before the Court, will be cited.

Brown vs. *Clark*, 4 *How.*, 15, was, like all the rest of these cases, a Writ of Error to a Circuit Court of the United States. It came from Mississippi. That State has an anomalous statutory practice in its own Courts, under which error lies from a decision on a motion for a new trial. As in the present case, but without the like legal warrant for so doing, the Counsel mixed up their *motion matter* with their duly taken exceptions. The case was here decided on its merits; but the Court, by Mr. JUSTICE NELSON, closed its judgment in these words:

"The Court have had some difficulty in noticing the exceptions taken to the instructions in this case, in the form in which they are presented upon the record. It is matter of doubt whether they point to the instructions, given and refused, to the Jury, or to the refusal of the Court below to grant a new trial. If to the latter, no question is presented upon which error would lie, according to the repeated decisions of this Court. (4 Wheat., 213; 6 Wheat., 542.)

"The counsel were probably misled, in making up the record, by the practice in Mississippi, where, by statute, error will lie to the appellate Court for a refusal to grant a new trial. (Laws of Miss., p. 493, § 53.) But the the rule is otherwise in the Federal Courts. That State has also a statute providing for the case of exceptions to be taken in the progress of the trial, in the usual form

(p. 620, § 40), which is the form that should have been observed in this case. The practice is particularly stated and explained in Walton *vs.* The United States (9 Wheat., 651), and in several later cases (4 Peters, 102)."

This may have been an instance of the very common practice before adverted to, *i. e.*, a mixture of such foreign matter as a motion for a new trial, with exceptions duly taken at the trial, both being within the body of a formal and duly *sealed* Bill of Exceptions. The record may have presented merely a statement, made up according to the *State* practice embracing both of these subjects. The report does not distinctly state how the fact was in this respect. If it was an instance of the latter practice, the action of this Court, in examining and passing upon the exceptions, is an exceedingly strong authority for the plaintiffs in Error here.

BRIEF ON THE MERITS.

This was an action brought to try the title to a certain share in a Mining Claim; and on an allegation of *superior title*, to recover the share. It was commenced by complaint, according to the provisions of the Territorial Code; and the issue to be determined must be gathered from the pleadings, made under the provisions of a Code which recognizes but one form of civil action, namely, a complaint, stating the cause of action, and praying redress.

The plaintiffs, in their complaint, stated their cause of action to be: that they were the owners of $\frac{280}{1200}$ of the Mining claim in question, and entitled to the possession of that share; that their title was derived by *conveyance* from one Camp, one of the original locators, through his attorney in fact, Musser, and Van Horn, his grantee; that defendants were wrongfully in possession; and praying judgment for restitution of the undivided $\frac{280}{1200}$ of the claim.

The defendants answered—

First. Denying generally plaintiff's title, and asserting their own lawful ownership, and their possession under that ownership.

Second. That Camp, on the 13th March, 1860, by his attorney in fact, for the sum of $13,750, *conveyed* the claim to Strong and Hearst, two of defendants, from whom the other defendants derived their title; and that *under this conveyance*, Strong and Hearst entered and became *possessed* of the claim; and that defendants have ever since been in lawful and peaceable possession as the true and lawful owners.

Third. That Camp, at the time of the conveyance by his attorney in fact, Musser, to Van Horn, to wit: May 15, 1861, had no right, title or interest in the claim;

and further, that they, (the defendants,) at the time of such pretended conveyance to Van Horn, were in possession, and holding in their own right, by virtue of Camp's previous conveyance to Strong and Hearst, adversely to Camp and all other persons, and that Camp's conveyance, by his attorney, to Van Horn, was void.

Fourth. That from March 13th, 1860, to the time of bringing this action, they (the defendants) have been in exclusive and peaceable posession, in good faith, believing that the *legal* and *beneficial title* and *estate* were *vested* in themselves, and with no notice of any adverse title of Camp, and those claiming under him, and that they have expended large sums in working the claim; and that Camp, Van Horn and the plaintiffs knew of their possession and expenditure, and gave no notice, &c.; and tacitly acquiesced in their (the defendants) many acts of ownership.

Fifth. That neither the plaintiffs, nor any one under whom they claim, have had possession within two years preceding the commencement of the action, and so that the action is barred by statute.

The plaintiffs put in a replication which traversed the answer, as follows:

First. By a denial of the lawfulness of defendants' possession, and a denial that they hold possession under a lawful ownership.

Second. By a denial that Camp ever sold or conveyed to the defendants, or that defendants ever paid him $13,750, or any other sum.

Third. By a denial that Strong and Hearst ever entered or became possessed, under any conveyance from Camp, or ever have had any but a wrongful possession.

Fourth. By a denial that Camp's conveyance to Van Horn was void, and reasserting title under it.

Fifth. By a denial that Camp, when his attorney conveyed to Van Horn, had no title, or that his attorney had no right to convey, and reasserting Camp's title and Musser's authority.

Sixth. By admitting that defendants have been in possession since May 15, 1861, but denying the rightfulness of that possession, and averring them to be intruders, &c., against the will and without the consent of Camp, Van Horn, or the plaintiffs.

Seventh. By denying the good faith of defendants' possession, and averring that their expenditures were not made, if at all, without notice of the plaintiffs' claim, and averring such notice; and denying plaintiffs' acquiescence in defendants' title or possession, and denying the alleged expenditure.

Eighth. That the answer, so far as it sets up the statute of limitations, does not state facts sufficient to constitute a defence; and without waiving this objection, denying that no person, whose title and estate the plaintiffs have, has been in possession within two years, or that their action is barred.

Voluminous as these pleadings are, it is plain that there were but three issues to be tried.

First.—Whether the plaintiffs or the defendants had the better paper title to the stock or undivided interest in question.

Second.—Whether, if the plaintiffs had the better paper title, the defendants had a possession, which in point of law was an answer to the plaintiffs' demand for restitution.

Third.—Whether, if the plaintiffs had the better paper title, their action was barred by the statute of limitation.

In order to appreciate the character of these issues, under the pleadings, and their bearing on the subject of

controversy, it is necessary to state the character of that subject.

The Court can gather enough from the record, and perhaps from other sources, to know that a Mining Claim is originally located by marking a certain extent of ground on the surface of the earth, and after recording the tract, the locator claims the exclusive right to work for the minerals beneath, the ownership of the soil being all the while in the United States. As these claims are measured by feet, and as they are located and worked generally by companies, the shares of the owners are measured by so many undivided feet; the number of feet belonging to each owner, representing an interest proportioned to the whole, as that number of feet is proportioned to the whole quantity of which the claim consists. The share involved in this action was an undivided 280 feet, or $\frac{280}{1200}$ of the whole claim. The claim was situated in the Gold Hill District, Story County, a District which adopted by-laws regulating these matters, June 11th, 1859, and March 4th, 1860.

It appears to be conceded that this is a kind of interest, the ownership of which passes by written conveyance. Both parties in this case claim under a written conveyance from the same person, who was one of the original locators. Although no fee is claimed in the soil, and the parties are mere occupants at the pleasure of the United States, the whole system of local law and regulation assumes that this right of occupancy, as between individuals, begins in and is continued by a paper title. In trying any case of controverted title to such a description of property, whether in the Territorial Courts or elsewhere, the first thing to be ascertained is, in whom is the paper title; and next, when the paper title is ascertained, in whom is there any possession which can overcome or displace the paper title. This is the course of all jurisprudence in relation to rights of property that are evidenced by paper title, and this kind of property can be no exception to it.

The plaintiff endeavored to have the issues tried in accordance with this course of investigation, and if the

presiding Judge had so conducted the investigation, and had given the proper instructions to the Jury, founded on the rules of law, a verdict could not have been found for the defendants. But, assuming as he did, that the issues were to be determined "more by plain principles of natural right and justice than by any settled or positive rules of law;" the learned Judge committed several Errors of law, which it is the duty of an appellate legal tribunal to redress, without reference to what were called the principles of "natural right and justice." It never can be admitted in this Court, that in any portion of the United States subject to its jurisdiction, where men's rights originate in law, whether that law is made by a recognized legislature, or is a body of local rules framed by the inhabitants of a district and having the force of law, such rights are to be determined by any other standard than the law itself. Strangely enough, the Judge who presided at this trial, both in his charge and in the instructions which he refused to give or did give, confounded rules of law, and what he thought "natural right and justice," in such a way that a very plain case for the plaintiffs resulted in a judgment for the defendants.

To maintain the issue on their part, in relation to the paper title, the plaintiffs introduced a power of attorney from Camp, one of the original locators, to J. J. Musser, dated Sept. 10, 1859, authorizing him *to sell* the interest of Camp in this Mining Claim; and several mesne conveyances by which all the title of Camp, through his attorney, Musser, and all Musser's title, to 280 undivided feet of this claim, became vested in Sparrow and Trench, the plaintiffs. And the plaintiffs there rested their case.

The defendants introduced a power of attorney from Musser to Spear, dated Dec. 12, 1859, authorizing him, among other things, "to manage, control, sell, or in any way dispose of all his, Musser's, interest in Mining Claims, whether held by him in his own right, or as attorney or agent for others;" and sundry mesne conveyances from Spear, as the assumed attorney of Camp, under the power given to him by Musser; by which the defendants claimed title to the same share claimed by the plaintiffs.

The power of attorney from Musser to Spear, and the conveyances from Spear to the defendants, were executed before the conveyances by Musser, as Camp's attorney under which the plaintiffs claimed.

In order further to maintain the issues on their part, the defendants introduced oral evidence tending to show their possession, or the possession of those under whom they claimed, since March 30, 1860, the date at which Spear, as the assumed attorney of Camp, undertook to convey the premises. The action was commenced Feb. 12, 1862.

The plaintiffs, in rebutter, offered Musser as a witness, apparently for the purpose of having him state what he had done in regard to the property in dispute after he discovered that Spear had undertaken to sell it; but the defendants objected to him, on the ground that his power of attorney from Camp and his deed as Camp's attorney to Van Horn, showed him to be interested in the event of the action. The Judge sustained this objection, and excluded the witness, and to this ruling the plaintiffs duly excepted.

It should be stated, that when the conveyances under which the defendants claimed title, including Musser's power to Spear, were introduced, they were admitted by the Judge *for the purposes afterwards stated in his charge, subject to all objections as to their legal effect.*

Bearing in mind that the first issue was as to the state of the paper title to this property, we find that in his charge the Judge treated the conveyances, under which the defendants claimed title, in this way: he told the Jury that the power of attorney from Camp to Musser must be construed by the rules of the common law, which made it a personal trust, that Musser could not delegate; consequently, that Musser's power to Spear did not authorize Spear to sell Camp's property.

The Judge then informed the Jury that he had allowed Musser's power to Spear to be read to them as evidence tending to show that Musser had placed Spear *in the care and possession of Camp's property, with authority to do such acts as might be necessary to preserve it for Camp.*

Having thus placed Spear in *possession*, under a power given by Musser, the Judge proceeded to change his ground from the rules of the common law to the rules of "natural right and justice," by telling them that there is in that Territory no property in land excepting a *naked possession;* that this was a controversy about *possession;* and that the right of *possession* in that Territory is *sur, rounded* by peculiar local circumstances, to which the rules of the common law must give way. He then takes up Spear's *possession*, obtained under a power which he admits only authorized Spear to do acts necessary to preserve the property for Camp, its owner, and instructs the Jury that if they believe that Musser did place Spear in *possession*, and that Spear transferred the *possession* to the defendants, voluntarily, and that Musser, on his return to the Territory, stood by, with a knowledge of Spear's *pretended sale* to defendants, knowing that defendants were expending money on it, without asserting his own or Camp's right to the property, and without repudiating the conduct of Spear, he, Musser, had *enabled* and *assisted* Spear to practice a fraud on the defendants, and defendants were entitled to a verdict. But that if the Jury believed that Musser had acted in good faith towards the defendants, and gave notice within a reasonable time after his return, of his or his principal's claim, and took reasonable care to disavow and repudiate the conduct of Spear, they were to find for the plaintiffs.

Under this charge, and the other instructions given and refused, the Jury, who had not been allowed to hear anything that Musser had to say, very naturally found a verdict for defendants.

It appears that not more than eighteen months elapsed from the date of Musser's power to Spear, (Dec. 12, 1859,) to Musser's conveyance to Van Horn, (May 15, 1861,) and Van Horn's demand on the Secretary of the Company to have his, Van Horn's title recognized (June 1, 1861). It is not shown precisely when Musser returned to the Territory; but assuming the whole of the above interval as the interval of his absence, the charge of the Judge results in this: That in a Territory governed

by the common law, an undivided share in a Mining Claim, which is all the while owned and worked by a Company, and which share is evidenced by a paper title, may be lost by the owner in 18 months or less, because in the absence of the owner and his agent, parties who have obtained *possession* of the stock, under an unauthorized conveyance by a sub-agent, have expended money on the land, without notice from the absent owner or his agent, of their title, interest, or claim to the property! An examination of the instructions refused and given in this case, will show that this cannot be the law, even in Nevada; and that to uphold it as law, will render all recorded or paper titles in Mining Claims held by companies in the mining regions utterly insecure. For, there is not a particle of evidence in this record, that shows that any steps were ever taken to forfeit, or declare forfeited, Camp's interest in this claim. It was a case of naked intrusion, under color of a purchase of the stock that was confessedly invalid to pass the ownership.

This, however, seems to be the proper place to bring to the attention of this Court the distinction taken by the learned Judge against a clear paper title; and taken in favor of parties who were said to be in *possession* under a void conveyance. What was this property, of which adverse *possession* was thus predicated? It appears very clearly, from the record, that this Mining Claim, being a location of certain recorded limits and extent, belonged to a company, called the Yellow Jacket Company, in which the undivided interest of each owner was represented by a proportional number of undivided feet. These companies, formed by the owners of undivided interests in the whole claim, are in truth *quasi* corporations, or joint-stock companies, which keep a record of the shares of their members, and assess their members, when needful, for the purpose of carrying on the mining operations. The witnesses who testified at the trial speak of the interest as "stock," and of the owners as "stockholders." There can be but one kind of *possession* predicted of the *property itself*, which is so

held by an associated company in undivided shares, and which is worked by the company for the purpose of distributing the profits among its members, according to their respective interests; and that possession is the possession of the company. (*Mallet* vs. *Uncle Sam Gold and Silver Mining Co.*, 1 Nevada State Reports, 188.) There is not a scintilla of evidence in this record that the defendants ever had manual possession of $\frac{280}{1200}$ parts of this ground, in severalty, or of the whole of it; or that the possession of the whole, or of any part, was ever out of the Yellow Jacket Company; nor is there the slightest evidence that the defendants themselves ever did any work on the ground. The kind of *possession* which they proved was, that after they had obtained a void paper title to the interest of Camp, they got themselves recognized on the books of the Company as the lawful holders of that interest, attended meetings, *paid assessments*, and probably took the dividends of profits. It was upon an *ouster* of this description that the learned Judge tried the question of possession as against a clear paper title of the true shareholder. It was just as if an owner of stock in any corporation had suffered the misfortune of having had his stock sold and transferred by an unauthorized sub-agent in his absence, and because the purchasers had been recognized on the books of the corporation, had paid assessments and taken the dividends in the absence of the true stockholder, a doctrine of adverse possession, *measured by rules supposed to exist in relation to adverse possession of land*, should be set up to defeat the clear paper title of the true stockholder.

If the learned Judge had been called upon to try a question of ownership to an entire Mining Claim between the Yellow Jacket *Company* and another *company* or an *individual*, it would have been perfectly proper for him to have investigated, first, the recorded title of the Yellow Jacket Company, and then to have ascertained whether there was an adverse possession of the property by the other party, that could in law overcome the recorded title of the Yellow Jacket Company. And in trying this last question, it would have been equally proper for him to be guided by the Mining By-laws or regulations

of the District, which determine when a claim once located is to be deemed abandoned or forfeited, or that a new possession of the ground has become an adverse possession. But there is no evidence in this case that the Yellow Jacket Company ever lost its possession of this claim, but the contrary expressly appears from the whole record; and the controversy in this case in no manner related to either the paper or the possessory title of the Company, but it was a question to whom a certain part of the stock, or undivided interest in the Company, belonged. To such a question, the By-laws of the district, put in evidence, which determine the amount of work to be done on a claim in a certain time, in order to hold it, have no application. Not one of those By-laws furnishes the slightest rule for determining what shall be deemed an *adverse possession of stock*, between different claimants of the undivided interest of a company that remains all along in the possession of the ground. They were framed *alio intuitu.*

This consideration also shows how entirely illusive it was, for the learned Judge to rule that Musser's subpower to Spear, while it could not authorize Spear to *sell* Camp's interest, did authorize Spear to take *possession* of Camp's interest. What *possession?* What was Camp's *interest?* It was an undivided share of a certain possessory right belonging to a Company, in premises, of which no one but the Company could have the possession, and of which the Company, of course, held in entirety, as trustee, for each of its lawful shareholders. The sole *possession* that could pass from Camp to Musser, and from Musser to Spear, was the possession of the power to represent the interest, to pay the assessments, and to take the dividends; and such a possession never could work a title in Spear, or those claiming under him, against the rights of the true stockholder, whenever he should appear, by any of the doctrines which the Judge applied to it, or any of the directions which he gave to the Jury. If these companies have not yet formed for themselves rules, by which the forfeiture of shares for want of representation or non-payment of assessments can be de-

termined, (a very improbable supposition,) this would afford no reason for *judicial legislation of such rules.* It is enough for us to point out the entire absence of such rules from this record, and to show that the principles applied by the Judge, to the question of possession, are entirely inconsistent with the safety of this species of property.

Having made these general suggestions, we proceed to the particular errors on which we claim a reversal of the judgment below.

THE INSTRUCTIONS PRAYED BY PLAINTIFFS, WERE THE FOLLOWING:

1st. That on the pleadings in this case the only question is, whether the plaintiffs or defendants have the better title to the property in suit.

2d. That the letter of attorney, from Camp to Musser, was sufficient in form and effect to empower Musser to execute to Van Horn, the predecessor of plaintiffs, a right to the premises in question, and that the deed from Musser's attorney, in fact, &c., to Van Horn, in evidence, is a sufficient conveyance or transfer of the right of Camp to Van Horn, and the subsequent deeds from Van Horn to plaintiffs, sufficient to convey to them the title of Van Horn; and that upon this title, so shown, plaintiffs may maintain this action; or in other words, this title is good.

3d. That the power of attorney, aforesaid, gave no authority to Musser, to appoint Spear as the attorney of Camp, to sell the claim in suit, and the sale of the premises by Spear to Strong, Hearst & O'Neil, was, and is simply therefore void.

4th. That upon the facts of this case, shown by the proofs, the plaintiffs here are not estopped from setting up the title derived from Camp.

5th. That upon the facts of this case, neither the deed to the plaintiffs, nor to Van Horn, are void, because of adverse possession by defendant; but that the same is valid, notwithstanding such possession as the defendants have proved they had of the premises.

6th. The conveyance to Strong & Hearst, and to O'Neil, by Spear, as attorney in fact for Camp, introduced in evidence by the defend ants, are void, for want of authority in Spear, and they passed no interest or title to the mining ground in question, to defendant.

7th. The defendants were bound to ascertain the authority of Spear, and no authority in Spear to convey having been shown, they must be presumed to have taken their conveyances from Spear, with full knowledge of his want of authority to convey the mining grounds in question.

8th. The defendants taking conveyances from Spear, as attorney in fact for Camp, were bound to ascertain his powers, and the powers of attorney from Camp to Musser, and from Musser to Spear, no other authority having been shown, furnished conclusive evidence of his want of power, of which they are bound to take notice.

9th. If said defendants entered upon the ground in question, under the conveyances from Spear, with the knowledge, or the means of knowledge, of an absence of authority in Spear to convey, they were trespassers.

10. And being so trespassers, the fact that said defendants levied and paid assessments, and expended monies, or made improvements, on the claims in question, cannot be pleaded as an estoppel by them, when the fact of the title is open and notorious, even though the owners stood by and saw it.

And the Court gave 3d, 5th and 6th of said instructions so asked, and refused to give each of the other of said instructions. To the refusal of each and every one of said instructions, the said plaintiff then and there duly excepted.

The said defendants asked the Court to give the following instructions to the Jury:

Instructions asked by Defendants.

1st. If the Jury believe from the evidence, that after the conveyance by Spear to the grantors of the defendants, Hearst, Strong & O'Neil, that Camp, or those claiming under him, either expressed, or by implication, abandoned his claim to the possession of the premises, then neither said Camp, nor the plaintiffs who claim under him, can now assert any right or title to the same, or against the defendants.

2nd. If the Jury believe from the evidence, that on the 30th day of March, 1860, Wm. S. Spear, being in the actual possession of the premises in controversy, and having no sufficient legal authority to sell and convey said premises to the defendants, or their grantors, assumed to convey, and did convey said premises by deed under an assumed authority, as the attorney in fact of said Camp, and that immediately thereafter, said defendants, or their grantors, went into possession under said deed, with the knowledge and consent of said Camp, or of his agent and attorney, Musser, and made permanent and valuable improvements therein, with the knowledge of said

Camp, or said Musser, and that said Camp or said Musser, acquiesced in said possession, without making any claim of title, or right of possession, to said premises, for the space of fifteen months, or thereabout, and during all that time, said Camp, and said Musser, neglected to pay any assessments, or to do any work on said premises, so as to save them from forfeiture or relocation under the mining laws of the district, where said property is situated; that the said Camp, and said Musser, are both estopped to set up the title of said Camp, against the defendants in this action; and the plaintiffs claiming under said Camp and Musser, are equally estopped, and defendants are entitled to a verdict.

Both of which instructions were given by the Court. To the giving of each of said instructions, the plaintiffs, by their Counsel, then and there excepted.

Now, although the presiding Judge gave the third, fifth and sixth of the instructions asked by the plaintiffs, his refusal to give the others, and his giving the instructions prayed by defendants, were erroneous, in the following respects:

FIRST ERROR.

In not instructing the Jury, as requested, that the plaintiffs' paper title, as against the defendants' paper title, was good, and sufficient to maintain the action.

The Judge had given to the Jury the instruction that the only question in the case was, whether the plaintiffs or the defendants had the better title to the property in suit. When, therefore, he came to the consideration of the *paper title*, it was his duty to tell the Jury that the conveyances by which the plaintiff claimed, were good, to pass the property to the plaintiff; leaving for subsequent inquiry the question whether the defendants had shown a possession that could in law overcome the plaintiff's paper title.

The conveyances under which the plaintiffs claimed, were Camp's power to Musser, and Musser's conveyance to Van Horn. The latter was under seal; the former was not. But no objection could be made to the want of a seal to Camp's power to Musser, for it was the common source to which both parties traced title; nor does it ap-

pear that any such objection was taken at the trial, or that it constituted, in the slightest degree, a reason why the Judge refused the plaintiff's request to instruct the Jury that this power was "sufficient in form and effect, to empower Musser to execute to Van Horn" the conveyance which he did execute. Nor does the record disclose any reason why the Judge refused to instruct the Jury that Musser's conveyance to Van Horn was sufficient, and that the mesne conveyances to the plaintiffs were sufficient to pass the title. Without this instruction, the case could not be properly launched.

SECOND ERROR.

In not instructing the Jury that the facts proved, did not estop the plaintiff from setting up the title which they derived from Camp, and in giving the instruction asked by defendants, that Camp, Musser and plaintiffs were all estopped from setting up Camp's title against the defendants, if the Jury should believe the facts recited in defendants' second prayer.

The facts which the Jury were thus asked or authorized to find, were these:—

1st. That Spear, on the 30th of March, 1860, was in the *actual possession* of the *premises* in controversy, without authority to *convey* to the defendants.

2d. That he did, in fact, undertake to convey, by an assumed authority as Camp's attorney.

3d. That immediately thereafter, defendants, or their grantors, went into possession, *under Spear's deed*, with the knowledge and consent of Camp, or of his attorney, Musser.

4th. That being so in possession, defendants made valuable and permanent improvements *thereon*, with the knowledge and consent of Camp or Musser, and that Camp or Musser acquiesced in said possession, without

making any claim of title, or right of possession to said *premises*, for the space of *fifteen months or thereabouts*, and during all that time said Camp or Musser neglected to pay any assessments or do any work on said premises, *so as to save them from forfeiture, and re-location under the mining laws of the district.*

Assuming, for the argument's sake, that there was evidence in the case which might have warranted the Jury in finding some of these facts, if the controversy had been between two successive locators of a claim, there was, in this instruction, an utter confounding of the real subject in controversy, with a subject which was not in controversy; and consequently, these facts, as stated, were entirely irrelevant to the issue, whether the plaintiffs' written paper title had been overcome by an adequate adverse possession of the *res*. The *res* in controversy was not a tract of land, or the right to an exclusive possession of a tract of land; but it was a certain undivided share, in the nature of stock, in a possessory right of working a mine, which right was the property of a company, never out of the possession of the company, never in the possession of any single member as such, and never exposed, for anything that appears, to forfeiture or re-location. Hence, it was entirely immaterial to the issue, whether Camp and Musser had acquiesced in the intrusion of the defendants *upon their stock*, or had omitted to pay assessments, for "fifteen months or thereabouts," unless it could be made to appear, as it certainly did not appear, that there is some law or regulation by which the stock or shares in these companies can be forfeited in "fifteen months or thereabouts," and become the property of a person, who having obtained a void conveyance of it, intrudes himself as a stockholder, and is recognized by the Company, without any title whatever. Hence, also, it was immaterial whether Camp or Musser had done any work on the ground, during the "fifteen months or thereabouts." None of the shareholders appear to have done any work on the ground, in a several and individual capacity, after the claim was organized as

a company, in April, 1860; and the supposed adverse possession of defendants, for "fifteen months or thereabouts," began in March, 1860, and, after the organization, the claim was worked by the company.

Under these circumstances, it was plainly the duty of the Judge to have told the Jury that the only question of adverse possession that could arise in this case, related to the mere possession of the stock or undivided share in this company; that the sufficiency of the possession by an intruder, claiming under a void conveyance, against the true owner, was not in any way affected by the by-laws, which determine the forfeiture of claims: that if the intruder on the stock had paid assessments, he had paid them in his own wrong, or if that could be avoided, he could have a recovery back from Spear or Musser, but that under no circumstances could such payment confer on him a title; and that the sole question arising out of any alleged acquiescence or silence of the true owner, was, whether under all the facts, he meant to give up the stock or share to the intruder. On this last point, there is absolutely nothing in the record which can afford any guide to the adoption of the period of "fifteen months or thereabouts," as warranting any inferences whatever in the case of an absent owner; and it fully appears that on the return of Musser to the Territory, he took immediate steps to assert Camp's title, and that Van Horn, after he had bought Camp's title, sought to have it recognized by the Company, and offered to pay all assessments due on the share. This occurred June 1st, 1861.

But if it were otherwise, it was still error in the Judge not to have instructed the Jury that these alleged facts did not *estop* the plaintiffs from *setting up* their paper title. Clearly they could set up their title and show it; and then the question was, if the defendants had not a better paper title, whether they had shown a possession adequate, in reference to the nature of the *res*, to overcome the title of the plaintiffs.

But there is another aspect of this doctrine of estoppel, as applied by means of the supposed facts, to prevent the

plaintiffs from setting up their title. It appears, from collating the charge with the instructions given and refused, that the Judge meant to have the Jury understand that, although Musser's power to Spear was void, as an authority to sell and convey Camp's interest, yet that it did purport to give Spear authority to sell and convey, and at all events let Spear into a lawful possession as Camp's agent to manage; and that if Musser, on his return to the Territory, found that defendants had taken a conveyance from Spear, and were expending money, &c., and Musser stood by without asserting Camp's title, an *estoppel in pais* arose, after a "considerable length of time," to prevent Camp or Musser, or those claiming under him or them, by subsequent conveyance, from setting up any title.

Now, if the learned Judge had in his mind what is commonly called an "*equitable estoppel*," or *estoppel in pais*, there are several legal requisites to such an estoppel, which must be the same in Nevada as elsewhere.

1st. The party who relies on such an estoppel must have been placed in the position in which he stands without any fault or negligence, or omission of his own.

2d. If the expenditure of money, or other loss, is one of the equities on which he relies to make out the estoppel, he must show affirmatively that the party against whom he pleads the estoppel knew of his expenditure or loss at the time it occurred, and acquiesced or stood still long enough to raise the reasonable presumption that he did not mean to assert a contrary state of things to be the true state.

3d. That the party claiming a state of things which is not the true state, by the operation of an estoppel, has no means of being made whole, if the true state of things is restored, because the other party has, by his act or omission, deprived him of such means.

These principles we suppose to be undeniable; and if they are applied to the facts proved in this case, the supposed *estoppel* vanishes.

1st. It is clear that Musser's power to Spear did purport to give Spear authority to sell and convey any interest held by Musser in mining claims, whether held by him in his own right or as agent of others; that if the defendants looked at Spear's power at all, they saw that it contained this clause; that under it Spear assumed to sell *Camp's* property; that defendants took a conveyance of *Camp's* property from *Spear*. But there is no evidence that they took a single step to ascertain Spear's authority, and if they had called for it, and had seen Camp's power to Musser, they must have seen that Spear had no authority whatever to sell Camp's interest in this mine. The first element, therefore, of an *estoppel in pais*, is wanting, namely, due diligence in the party asserting the estoppel.

The *estoppel in pais*, founded on the effect of one's standing by and allowing another to expend money on his property, cannot arise where the money is expended with knowledge of the real state of the title.

Rennie v. *Young*, 2 De Gex, and J., 136.
Parker v. *Barker*, 2 Metcalf, 423.

Knowledge of the real state of title and having the means of knowledge are the same, in equitable estoppels, or as to the effect of acquiescence.

Epley v. *Witheron*, 7 Watts, 163.
Coles v. *The Bank of England*, 10 Adol. and Ell., 437, 452.

2d. The defendants got their supposed title from Spear, in March, 1860. Musser appears to have been absent in Washington, as a Delegate in Congress, and it is not shown that he returned to the Territory before May, 1861. If defendants paid Spear $13,750 for this property, and made other expenditures on it, between March, 1860, and May, 1861, they have utterly failed to show any knowledge on the part of Musser that Spear had sold it to them; or that they had paid assessments on it before Musser returned to the Territory, or that Camp ever knew it. Musser's acquiescence, therefore, in what he did not know, or is not proved to have known for a space of fifteen months, amounts to nothing. Musser, therefore, who

cannot be said to acquiesce until he knows, did not *cause* the expenditure by his silence or acquiesence. As soon as he returned to the Territory and heard what had been done with Camp's property (in May, 1861), he informed O'Neil, one of the defendants, that he meant to claim it. On the 15th May, 1861, he sold it to Van Horn; and as early as June 1, 1861, Van Horn demanded to be recognized as owner, and offered to pay his assessments.

What one man does, and afterwards claims that he did on the faith of admissions or acquiescence by another, can operate as an *estoppel in pais* only by his showing affirmatively that the other *knew* what he was doing. "To constitute such an estoppel, a party must have *designedly* made an *admission* inconsistent with the defence or claim which he proposes to set up, and that another party has, with *his knowledge and consent*, so acted on that *admission* that he will be injured by allowing the admission to be disproved; and this injury must be coextensive with the estoppel."

CURTIS, J., in *Howes* v. *Merchant*, 1 Curtis' Circ. C. R., 144.

3d. If Musser could be said to have caused the defendants' outlay by his unguarded power to Spear, still the third element of an *estoppel in pais* is wanting. Because, if the true state of things is restored, defendants can recover all they have expended by suing Spear on a false warranty of title, or by suing Musser for wrongfully holding out Spear as his agent to sell Camp's property. This being the case, neither Camp nor those claiming under him can be estopped from recovering Camp's property, by an estoppel arising out the acts of Camp's agent, for the defendants have a remedy against both Spear and Musser.

That the injury occasioned by the act of another, when set up as an element of *estoppel in pais*, must be "coextensive with the estoppel," (Curtis, J., *ubi, supra,*) is but another form of stating the principle that unless the estoppel is allowed to operate, the party complaining of injury is without any redress.

Cambridge Savings Bank v. *Littlefield*, 6 Cushing, 210.
Biddle Boggs v. *Merced Mining Co.*, 14 California R., 371.

THIRD ERROR.

In refusing to give the 7th, 8th, 9th and 10th Instructions, asked for by plaintiffs, as follows:

7th. The defendants were bound to ascertain the authority of Spear, and no authority in Spear to convey having been shown, they must be presumed to have taken their conveyances from Spear with full knowledge of his want of authority to convey the mining grounds in question.

8th. The defendants taking conveyances from Spear, as attorney in fact for Camp, were bound to ascertain his powers, and the powers of attorney from Camp to Musser, and from Musser to Spear, no other authority having been shown, furnished conclusive evidence of his want of power, of which they are bound to take notice.

9th. If said defendants entered upon the ground in question, under the conveyances from Spear, with the knowledge or the means of knowledge of an absence of authority in Spear to convey, they were trespassers.

10th. And being so trespassers, the fact that said defendants levied and paid assessments and expended moneys, or made improvements on the claims in question, cannot be pleaded as an estoppel by them, when the fact of the title is open and notorious, even though the owners stood by and saw it.

It is to be borne in mind that while the Judge held Musser's power to Spear to be void as an authority to sell and convey Camp's property, he admitted it to be read to the Jury, "as evidence tending to show that Musser placed Spear in the care and possession of the property in dispute, with authority to do such acts in relation thereto as were necessary to preserve the property for Camp." (Charge, Record, p. 22.) He also admitted Spear's deed as Camp's attorney to the defendants, to be read, and while admitting that it was void, as a sale and conveyance of Camp's property, he allowed it to be treated as evidence that the *actual possession* had been transferred to the defendants by a person who could lawfully transfer it. In this way, the defendants were allowed to contend that their possession began, not as intruders or trespassers, but *rightfully* or *innocently;* and then the attention of the Jury was directed to the sup-

posed subsequent conduct of Musser in *acquiesing* in this possession, and to the supposed effect of such acquiescence in making a possessory title capable of estopping or overcoming a paramount paper title.

Now it will be at once apparent that the plaintiffs' prayers, 7th, 8th, 9th and 10th, were most pertinent and necessary to be given.

In the first place, Spear's deed to the defendants, as Camp's assumed attorney, had no tendency whatever to show that Spear had delegated to defendants the authority, which the Judge held Spear to possess, namely, *to preserve the property for Camp.* On the contrary, that deed was an absolute conveyance in Camp's name, with full warranty; and no ingenuity can torture it into an appointment of defendants as Camp's agents to preserve the property for Camp. In the next place, it was not shown that defendants ever saw Musser's power to Spear, or Camp's power to Musser, or that they ever asked to see either of them.

It was, therefore, the duty of the Judge to have told the Jury that when the defendants took an absolute conveyance of Camp's property, executed in Camp's name by Spear as Camp's attorney, they were bound to ascertain Spear's authority; that in truth Spear had no authority; that not having ascertained this, when they were bound to ascertain it, the presumption of law is that they knew the authority did not exist; that if they saw Musser's power to Spear, knowing, as Spear's deed informed them, that it was Camp's property which they were buying, they were bound to inquire into Musser's authority; that as Musser had no authority to delegate a power to sell, if the defendants did not ascertain this, being bound to ascertain it, the presumption of law is that they knew it; and that a party who thus obtains possession under a conveyance which he knows, or has means of knowing, to be void, is a trespasser, wrongfully in possession, and that his expenditures on the property are made in his own wrong, so far as the true owner is concerned. Indeed, Spear's deed to the defendants expressly asserts that it was Camp's property.

FOURTH ERROR.

In giving to the Jury the following instructions asked by defendants:

"If the Jury believe from the evidence that after the conveyance by Spear to the grantors of the defendants, Hearst, Strong and O'Neil, that Camp or those claiming under him, either expressed or by implication, abandoned his claim to the possession of the premises, then, neither said Camp nor the plaintiffs who claim under him, can now assert any right or title to the same, or against the defendants."

What is the meaning of abandoning a claim to the possession of property, by *implication?* An *intent* to abandon one's property to others might be proved by a great variety of evidence; and when that *intent* is proved, from any competent evidence, an express abandonment is proved. But an *implied* abandonment must be an abandonment with something less than an *intent* to abandon; so that a loss of the property is worked without or against an *intent* to lose it. In no other sense, can there be an *implied* abandonment.

Besides, what evidence was there in this case, to warrant the putting of any issue to the Jury on the subject of *abandonment?*

1. Camp, an original locator of this Mining Claim, and owner of one undivided fourth of the whole "Yellow Jacket" claims, on the 10th of September, 1859, made his power to Musser to *take charge of and sell or otherwise dispose of* his interest. Camp then left the Territory. This power certainly shows no intention to abandon.

2. Musser, on the 12th December, 1859, appointed Spear as *his* attorney, to "manage, control, sell, or in any way dispose of all my interest in any and all Mining Claims, either held by me in my own right, or as attorney for others;" and left the Territory on public business. No intention to *abandon* Camp's property, or its possession, can be inferred from this act; on the contrary, the

Judge expressly authorized the Jury to find that Spear had been placed in possession, *to preserve the property for Camp.*

3. Until May, 1861, there is not a particle of evidence in the case to show that Musser knew of Spear's undertaking to sell Camp's property, or knew that anybody was in possession, claiming adversely to Camp; or that Camp knew of anything of the kind. No intent to abandon, therefore, could be found in this interval.

4. In May, 1861, Musser, who had then returned to the Territory, told O'Neil, one of the defendants, that he meant to claim this property. May 15, 1861, Musser sold it to Van Horn for $2,500; and June 1, 1861, Van Horn demanded of the Secretary of the Company to be registered as the owner, *and was excluded.*

September 8, 1861, Van Horn sold to Sparrow, for $9,000, all his title, both at law and in equity, in possession and in expectancy, to 180 feet of this claim. On the same day, Van Horn sold to Trench, for $5,000, all his claim to 100 feet.

February 10, 1862, Trench conveyed his interest to Earton; and the same day Sparrow conveyed his interest to Earton; and on the same day Earton conveyed the whole 280 feet, as an undivided interest, to Sparrow and Trench, the plaintiffs.

February 12, 1862, this suit was commenced.

From these facts, how could the Court authorize the Jury to draw the inference that Camp, Musser, Van Horn, Earton, or the plaintiffs, or any of them, ever meant to abandon this property, or ever did abandon it, or the *possession* of this property, to parties who had come into it under a void conveyance?

FIFTH ERROR.

In excluding the testimony of Musser, on the ground of interest.

Musser appears to have been called as a witness by the plaintiffs, *in rebutter;* and it is fairly presumable that he was called to explain when he returned to the Territory, and to show that he had not acquiesced in the defendants' possession of Camp's interest, after he knew it. At all events, the state of the case, in respect to his alleged interest, when he was offered as a witness, and rejected, was this:

"It was admitted that the title * * was in Camp, on the 30th March, 1860, and that both parties claimed title through said Camp."

The plaintiffs produced a power from Camp, dated September 10, 1859, empowering J. J. Musser, as my attorney, in fact, to * * sell or otherwise dispose of my one undivided fourth interest in the claims in question, "hereby ratifying all that said J. J. Musser may do in the premises." This was without seal.

The plaintiffs next produced a deed, dated May 15, 1861, from J. J. Musser, as attorney in fact of Camp, "of the first part," to H. Van Horn, from whom the plaintiffs derived interest by mesne conveyances. Musser's deed contained a convenant in the following words:

"And the said party of the first part, for himself and for the said H. B. Camp, and for his heirs, doth hereby agree to, and with the said party of the second part, and his heirs and assigns, that he has full right and power to sell and convey the said premises, for and as the attorney, in fact, of the said H. B. Camp, and that the said premises are now free and clear from all sales or mortgages, made or suffered by the said party of the first part."

The defendants had put in evidence a power of attorney, from Musser to Spear, dated December 12, 1859, and a deed of conveyance of the premises in question, under which they derived title, bearing date March 30, 1860, and purporting to be the deed of Camp, by said Spear, as his, Camp's, attorney, in fact.

These two instruments "were admitted in evidence for the purposes specified in the charge of the Court." The charge stated, that "the power of attorney from Musser to Spear, conferred no power upon the latter to sell or convey the premises in dispute. But the Court allowed this power to be given in evidence to the Jury, as evidence tending to show that Spear was placed in care and possession of the property, by Musser, and with authority to do such acts concerning the premises, as were or might have been necessary to preserve the property *for* Camp."

As it respects the idea that Camp or Musser had "stood by," or otherwise acquiesced in improvements or outlays by the defendants, without setting up title, there was no proof in the case.

The rejection of Musser was on the ground that he was interested in the event of the action. It does not appear that the Court put his rejection on the ground, that he, Musser, had created a title in the defendants by such alleged standing by or acquiesence, *prior* to his, Musser's, conveyance to Van Horn. On the contrary, it seems to have been placed on the naked ground, that two papers, to wit, Camp's power to him, and his conveyance to Van Horn, produced in him, Musser, an interest in the event.

It is difficult to perceive how any such effect could have been produced by these instruments.

I. Camp's right to sell was *admitted;* and the sufficiency of the document constituting Musser his, Camp's, attorney for sale, was admitted by the Court and by both parties, both sides claiming under it.

II. That there was no valid sale or mortgage, prior to the sale to Van Horn, was held by the Court throughout the case. It would therefore seem quite clear that the covenant of Musser with Van Horn had been faithfully kept.

III. Apart from these considerations, Musser does not appear to have had any interest in the event, of such a nature as to render him incompetent. His interest, if any, was balanced.

1. "The common law of England" * was "the rule of decision."

1 Laws of Nevada Ter., chap. 1, p. 1.

2. Musser could not have become interested unless it was by the covenants in his deed to Van Horn. These were 1st, that he had power from Camp to sell; and 2d, that there were no sales or mortgages by himself or by Camp. On the other hand, Musser had in terms authorized Spear "to sell, or in any way dispose of all my interest in any and all Mining Claims, either held by me in my own right, or as attorney or agent." Camp had expressly authorized Musser "as my attorney in fact to take charge of my * * interest in the claims" in question.

If, by reason of his not possessing a power of substitution, or for any other cause, Musser could not lawfully have enabled Spear to make a valid conveyance of this claim, surely he, Musser, became liable to reimburse to the parties, whom he had induced to believe that such power existed, the full sum paid by them, in case it should be established that such power did not exist; *i. e.*, $13,500. The consideration received by Musser, on his conveyance to Van Horn, was only $2,500. Unless on full proof of ill-faith on the part of Musser, which did not appear, the sum, with interest, was the extent of his

liability to the plaintiffs. He was liable to the defendants in a much larger sum.

As to the principal fact in controversy, Musser's interest was precisely balanced. If we look to the relative pecuniary extent of his interest on each side, we find that he was greatly interested in favor of the defendants.

The defendants asserted by their pleadings, and contended on the trial, that they entered under Camp, believing Spear to be his, Camp's, agent, duly authorized to sell. There was no evidence that they ever saw the original power of attorney to Musser, or had any notice that Musser had not a power of substitution. Spear, who conveyed to the defendants, no doubt from an accidental misuse of terms, had express authority under seal from Musser "to sell, or otherwise dispose of," not only all Mining Claims held by him, Musser, in his own right, but "as attorney or agent." These words constituted an assertion on the part of Musser, to any person dealing with Spear, as his, Musser's, substitute, that in respect of all Mining Claims, held by Musser as attorney or agent, he, Musser, had power of substitution. It is a necessary implication from the fact of authorizing Spear to act as attorney, in his, Musser's, place, and sell these lands.

Cushman *vs.* Looker, 2 Mass. R, 107.

IV. The only interest that can disqualify a witness, is a clear and certain interest in favor of the party calling them.

1 Greenleaf on Evidence, §§386, 390.

The common law of England was the rule of decision.

1 Laws of Nevada Territory, ch. 1, p. 1.

1. Where his interest, if any, is balanced, the objection fails.

1 Greenleaf, §§ 391, 399.
Lewis *vs.* Hodgdon, 5 Shipley's R., 271.

2. In an action concerning the title or possession between two independent grantees of the same premises, their common grantor is, on this principle, a competent witness. Such, in effect, was Musser's attitude in this case.

3. Musser's liability to Van Horn being on his *covenant*, while his liability to Spear's grantees was in a less solemn, or a less direct form, is not sufficient to prevent the doctrine of balanced interest from being applied.

1 Greenleaf, §§ 393, 398.
Prince *vs.* Shepard, 9 Pick., 176, *in point.*

3. Circumstances being such that it might be somewhat easier for the witness to prosecute or defend, as to one party than as to the other, would not affect the balance or neutraliy.

Starkie, Evidence, Part 4, p. 752, (side paging.)
Bait *vs.* Kershaw, 2 East., 461.
Parker *vs.* Weeks, 18 Mass. R., 201.
Starkweather *vs.* Mathews, 2 Hill's N. Y. R., 131, 132.

GEO. T. CURTIS,
Of Counsel
with Plaintiffs in Error.

SUPPLEMENT TO BRIEF.

Being an Abstract of the Record with reference to the folios and to the relevant sections of the Nevada Code of practice.

The action was commenced in the First Judicial District Court, for Nevada Territory, Feb. 12, 1862, by Erastus Sparrow and Joseph Trench, as plaintiffs, against Charles L. Strong, George Hearst, Alexander E. O'Neil, Robert Paxton, Joseph Clark, H. Thompson, John Henning, John O. Earl, L. W. Newell, and H. H. Raymond, defendants. (*Record, fo.* 4, 6.) It was in the form prescribed by the Nevada Code of Practice, adopted Nov. 29, 1861, for the recovery of an undivided interest in a Mining Claim.

(*Laws of Nevada Territory, First Session, pages* 314 *and onward*, §§ 1, 18, 22, 37, 39.)

The plaintiffs claimed that they were lawfully seized, lawful owners for mining purposes, and lawfully entitled to possession of an undivided $\frac{280}{1200}$ths of "that certain quartz vein of gold and silver-bearing earth and rock, * and known as the Yellow Jacket vein or claim," the whole "comprising 1,200 feet in length on the vein, including all its dips and spurs, * including 25 feet of surface on each side of the ledge or vein, being the same ground or claims taken up or located on or about the first day of May, 1859, by H. B. Camp, John Bishop, and J. F. Rogers." Also, that the defendants are in wrongful possession, and wrongfully withhold the same. (*Record, fo.*4.)

The defendants Raymond and Thompson, disclaimed, and thereupon judgment passed against them. (*Record*, *fo.* 18.)

The other defendants, except Newell, answered. (*Fo.* 7 to 11.) They set up several defenses:

1st. Admitting their possession, they asserted generally that it was rightful and not wrongful, as alleged by the plaintiffs.

2d. That H. B. Camp, "the original locator, and owning the said undivided 280 feet," by his agent in fact, thereunto duly authorized, did, on March 13, 1860, in consideration of $13,750, convey to Strong and Hearst, two of the defendants, from whom the others, now pleading, derive title.

3d. That on May 15, 1861, when the deed was executed, under which the plaintiffs claim, neither Camp nor his alleged agent, Musser, had any title or power to convey.

4th. That on said May 15, 1861, the defendants were in possession, holding adversely, wherefore the deed under which the plaintiffs claim, was void.

5th. That from the time of their said purchase, on March 30, 1860, the defendants have been in possession, *bona fide*, and made large expenditures, and that "neither the said Camp, nor the said Van Horn, or the plaintiffs, though well knowing of the possession of said defendants, and of their large expenditures in time, material, labor, and money, ever notified said defendants, or either of them, of his or their adverse claim of title thereto; but, on the contrary, quietly stood by and tacitly acquiesced in the exercise by defendants, of many acts of ownership over said undivided interest, and at no time did they, or either of them, forbid

said defendants working said interest, or forewarn them of the existence of the alleged adverse claim or title, or of their intention to assert the same."

6th. That the plaintiffs were barred by two years' adverse possession.

The plaintiffs by their replication, specially and in detail, denied each of the allegations of the answer, except that the defendants entered and held possession, and had incurred *some* expenditures for improvements. (*Record, fo.* 11 to 17.)

Issue being thus joined, a trial was had by Jury, May 21, 1862. A verdict was rendered for the defendants, and judgment was thereupon entered accordingly against the plaintiffs, for costs. (*Record, fo.* 20, 21.)

A statement was duly prepared according to the Nevada Code. (*Record. fo.* 26. *Laws of Nevada Ter.*, 1*st Sess.*, *pp.* 345, 362, §§ 188, 189, 190, 276, 279.) A motion for a new trial was made thereon in the District Court, and denied, Nov. 13, 1862. (*Record, fo.* 26, 27, 63.) Such decision was excepted to. (*Record, fo.* 63.) And, according to the *laws of Nevada Territory*, *pp.* 346, 363, §§ 193, 285, an appeal to the Supreme Court of Nevada Territory was taken, Nov. 15, 1862. (*Record, fo.* 22 to 26.) That Court AFFIRMED THE JUDGMENT of the District Court, with costs. (*See Record, page* 28.)

The Judgment of the Territorial Supreme Court is in these words: "On appeal from the District Court of the First Judicial District, in and for Storey County.

"Now, on this day, this cause being called, and having been heretofore argued and submitted, and taken under advisement by the Court, and all and singular the law and the premises being by the Court here seen and fully considered, the opinion of the Court herein is delivered by TURNER, C. J., MOTT, J., concurring, to the effect that the judgment of the Court below be affirmed.

"Whereupon, it is now ordered, considered, and adjudged by the Court here, that the judgment and decree of the District Court of the First Judicial District, in and for Storey County, be, and the same is hereby affirmed with costs."

A Writ of Error was thereupon sued out to the Supreme Court of the United States, Aug. 14, 1863, pursuant to the organic law of said Territory. (*Statutes at large of the U. S., Vol. 12, p. 212, § 9.*) See Petition for Citn., *Record, fo.* 76; Affidavit of value of property in dispute, *Record, fo.* 78; Citation, *Record, fo.* 79; proof of service of citation, *Record, fo.* 80; Order fixing amount of bond, *Record, fo.* 80; Bond on Writ of Error, *Record, fo.* 81, 82; Writ of Error to this Court, *Record, fo.* 66, 67.

Assignment of Errors in this Court, *Record, fo.* 68 to 75. A Bill of Exceptions, in the form of a statement, as required by *Laws of Nevada Territory, 1st Sess., pp.* 345, 362, §§ 189, 276. It occupies the *Record from fo.* 26 *to* 58. It contains all the evidence that was given on the trial. (*Record, fo.* 48.)

It was admitted that on March 30, 1860, the title of the mining ground in question * was in H. B. Camp. And it was also admitted that both parties claimed through him. (*Record, fo.* 27.)

The plaintiffs produced the following evidence:

1st. A written power of attorney from Camp, empowering J. B. Musser, as his Attorney in fact, "to take charge of and sell, or otherwise dispose of," his "interest in the claims known as the Yellow Jacket Claims." (*Record, fo.* 27.) THIS INSTRUMENT CONTAINED NO POWER OF SUBSTITUTION.

2d. A deed of conveyance for said premises to H. Van Horn, in consideration of $2,500, and dated May, 15, 1861, under the seal of Camp, "by his attorney in fact, John J. Musser" (*Record fo.* 28 to 30.)

3dly, 4thly, 5thly, 6thly, and 7thly. Instruments transferring Van Horn's title to the plaintiffs (*Record fo.* 30 to 32.) Their title accrued September 8, 1861 (*Record fo.* 30, 31.)

No question arose, or was made, on these last five instruments. The parties had, by their pleadings, united in asserting the possession of the defendants. (*Record fo.* 4, 9, 11, 15.) That fact seems to have been assumed at the trial; and the plaintiffs having rested on the above mentioned proof of title, the defendants, without raising any question as to its sufficiency, *prima facie*, proceeded to introduce their responsive evidence. (*Record fo.* 32.)

The defendants produced—

1st. A power of attorney, from said J. J. Musser, the attorney of H. B. Camp, to William S. Spear, dated December 12, 1859. This instrument was in the common form of a simple power to act in Musser's name, and as his attorney, but it purported to give power as follows:

"All deeds of conveyance by quit-claim only to sign my name to any and all instruments, with or without seal, and to deliver the same, which may be necessary, in and about my business, either private or as attorney-at-law, * * to manage, control, sell, or in any way dispose of *all my interest in* any and all Mining Claims, either held by me in my own right, or as attorney or agent for these [Q. others], and generally to do any and every act which I myself might, could or would do, were I personally present, in and about my business or property of every name, nature and description." (*Record*, fo. 33.)

2ndly. A deed of release or quit-claim, for part of the premises in question, in consideration of $13,750, dated

March 30, 1860, from *Camp by Spear*, as his attorney, to Strong & Hearst, two of the defendants. 3dly. A like deed, dated March 27, 1860, for part of said premises, to O'Neill, another of the defendants; and 4thly, deeds transferring to the other answering defendants portions of the interest of Strong, Hearst and O'Neil (*Case, fo.* 34 to 37.)

No question arose as to any of these instruments so offered by the defendants, except as to Spear's authority to act for Camp. The Court admitted the power of Musser to Spear "for the purposes specified in the charge, subject to all objections." (*Record fo.* 32.)

The defendants also produced the by-laws of the Gold Hill district. (*Case, fo.* 37, 57.) Those adopted in 1859 provided that "all persons holding quartz claims shall actually work to the amount of $15 to the share within 90 days from the time of locating; and on compliance therewith shall hold the same for the term of 18 months as actual property." Those adopted March 4, 1860, provided that such persons shall work to the amount of three days for each claim in each month, or to the amount of $50, which shall hold said claim for 6 months. And that all claims located under the old law shall become subject to the revised laws after three months from this date, as to the working of said claims.

The defendants produced certain witnesses, whose testimony occupies the *record* from *fo.* 37 to 47.

The following is a precise statement of all the relevant facts which appeared from their testimony:

1st. On July 10, 1859, two contractors named White & Hammack, undertook, in writing, to "run the tunnel." The contract passed into the hands of Paxton & Hoover, a witness. The work was progressing in the autumn of 1859, and was completed about April, 1860. (*Record, fo.* 41, 45, 46.)

2d. In the autumn of 1859, whilst this contract was in force, Camp left the country, and did not afterwards return. (*Record, fo.* 45, 46, 37.)

3d. Musser, Camp's attorney, *soon after*, 12th December, 1859, went to Washington, as Member of Congress for Utah. Remained absent several months (*fo.* 46, 47). Precisely how long he was away don't appear. There is no evidence of the time of his return, or of any act *or omission* by him whatever, at any time subsequent to his said departure for Washington, except his said deed to Van Horn, dated May 15, 1861, and his conversation with O'Neil, making claim to the property on his return from Washington. (*Record, fo.* 27, 37, 45, 46.)

4th. Hoover says, about April, 1860, "I got in and struck the quartz; I called a meeting of the Company to take the contract off my hands; I told them my contract was completed; the members concluded I had fulfilled the contract." (*Record, fo.* 41.)

5th. This meeting was held in April, 1860, probably on the 21st of that month. It was the first meeting of the Company (*fo.* 37, 39, 45). Strong, O'Neil and Hearst, three of the answering defenddants, attended, "got their names on the book," and O'Neil was chosen President. (*Record, fo.* 41, 45.)

6th. Prior to this time, *i. e.*, the striking quartz, &c., in April, 1860, the property had no great market value. It then came up to $40 a foot. (*Record fo.* 42.)

7th. No act or *omission* of Spear appears, except his conveyance and his being "met at Sacramento," on his way to San Francisco. (*Record, fo.* 45.)

8th. O'Neil, one of the defendants, being sworn, on the trial, testified: "I heard Musser was going to claim it; heard it in May, 1861; * conversed with Musser about his claiming the interest, but

not till May, 1861; * heard Musser was going to claim it after his return from Washington; in May, I think, 1861; had conversation with Musser about this claim in May; can [probably means, can't] explain why I sent Henning to buy it." (*Record, fo.* 45, 46.)

9th. As early as June 1st, 1861, Van Horn, the purchaser under whom plaintiffs claimed, sent his agent, Judge Gilchrist, to the Company, who, in open meeting, in presence of defendants, exhibited Camp's power to Musser, and Musser's deed to Van Horn, and made oral and written demand that Van Horn be recognized and permitted to pay assessments (*Record, fo.* 43, 44, 47, 41, 38, 39).

He was met with threats of violence, and his application was rejected. (fo. 43, 44, 45, 46, 41, 38, 39.)

10th. Assessments prior to the trial amounted to $7 per foot; but only $2.03½ per foot were levied prior to June 1, 1861. (*Record, fo.* 47.) I. Y. Paul, Secretary of the Company, "told Clark [one of the defendants] he had better pay his assessments, or Gilchrist and Trench would tender, and if they should, and they [the assessments] were unpaid, he [the Secretary] would have to receive it from them." (*Record, fo.* 47.) "Trench laid down the money for the assessments" in gold (*fo.* 47). But the "assessments were all paid by parties representing the interests," (meaning, no doubt, of the defendants). (*Record, fo.* 37.) It does not appear at what precise times they were paid.

11th. Trench, one of the plaintiffs, had a distinct interest in the Company, and was present at meetings before acquiring his interest in these 280 feet. (*fo.* 38, 40.) Sparrow & Trench, the plaintiffs, attended meetings, asserted their claims to this 280 feet, and offered to pay assessments;

but were not recognized. (*Record, fo.* 40, 41, 42, 43.) At all times from the first meeting, in April, 1860, the defendants represented these 280 feet at the meetings. (*Record, fo.* 37, 39, 40, 41, 42.)

John J. Musser was offered by the plaintiffs as a witness, and rejected, on the ground, that by reason of his deed to Van Horn, he was interested in the event of the action. The plaintiffs excepted. (*Case, fols.* 47, 48, 19.)

The Court charged the Jury:

1. That the power of attorney, given by Camp to Musser, to sell, * must be regarded as a personal trust, confided by Camp to Musser, as his attorney in fact, and therefore could not be legally delegated.

2. For this reason, the power of attorney from Musser to Spear, conferred no power upon the latter to sell or convey the premises * to the defendants.

But after commenting at large on the peculiar condition of the country, the charge stated:

3. That when a controversy arises concerning or in regard to the right to possession to a Mining Claim, it is to be determined more by the principles of natural right and justice, than by any settled or positive rules of law. * That in this, and like cases, the ends of justice shall not be defeated by any of the stern technical rules of the common law.

This and much similar matter, intimating plainly that the Jury was not bound to follow the law, were followed by this closing direction:

"If you believe, from the testimony, that Spear had the lawful possession of the property from Col. Musser, and that he voluntarily transferred the possession to the

defendants, or to those under whom they claim, then it becomes important to inquire into the subsequent conduct of Col. Musser, in relation to the property in dispute. If you believe, from the testimony, that Col. Musser stood by, after his return from Washington, with a knowledge of the pretended sale by Spear, and knowing that defendants were expending their labor and money in developing and improving the property, and further, that he stood by for a considerable length of time without asserting his right to the property, and without disavowing and repudiating the conduct of Spear, he has enabled and assisted Spear to practice a fraud upon the defendants, and the defendants are entitled to a verdict. If you believe, on the contrary, Col. Musser has acted in good faith towards these defendants, that he gave notice, within a reasonable time after his return, of his claim to the property, or the claim of his principal, and that he took reasonable care to disavow and repudiate the conduct of Spear, then you will find for the plaintiffs." (*Record, fols.* 52, 53.)

This is the key note of the verdict and judgment.

This direction, went, of course, on an assumption of all the points of law and fact necessary to the establishment of a perfect title in the plaintiffs, and put the claim of the defendants to a verdict on this responsive suggestion.

The specific requests for instructions, as given or refused, brought the case to this same point precisely.

The following prayers of the plaintiffs for instructions were refused, and to each refusal the plaintiffs excepted. (*Fol.* 55.)

1st. That on the pleadings in this case, the only question is, whether the plaintiffs or defendants have the better title to the property in suit.

4th. That upon the facts of this case, shown by the proofs, the plaintiffs here are not estopped from setting up the title derived from Camp.

7th. The defendants were bound to ascertain the authority of Spear; and no authority in Spear to convey having been shown, they must be presumed to have taken their conveyances from Spear, with full knowledge of his want of authority to convey the mining grounds in question.

8th. The defendants, taking conveyances from Spear, as attorney in fact for Camp, were bound to ascertain his powers, and the powers of attorney from Camp to Musser, and from Musser to Spear, no other authority having been shown, furnished conclusive evidence of his want of power, of which they are bound to take notice.

9th. If said defendants entered upon the ground in question under the conveyances from Spear, with the knowledge, or the means of knowledge, of an absence of authority in Spear to convey, they were trespassers.

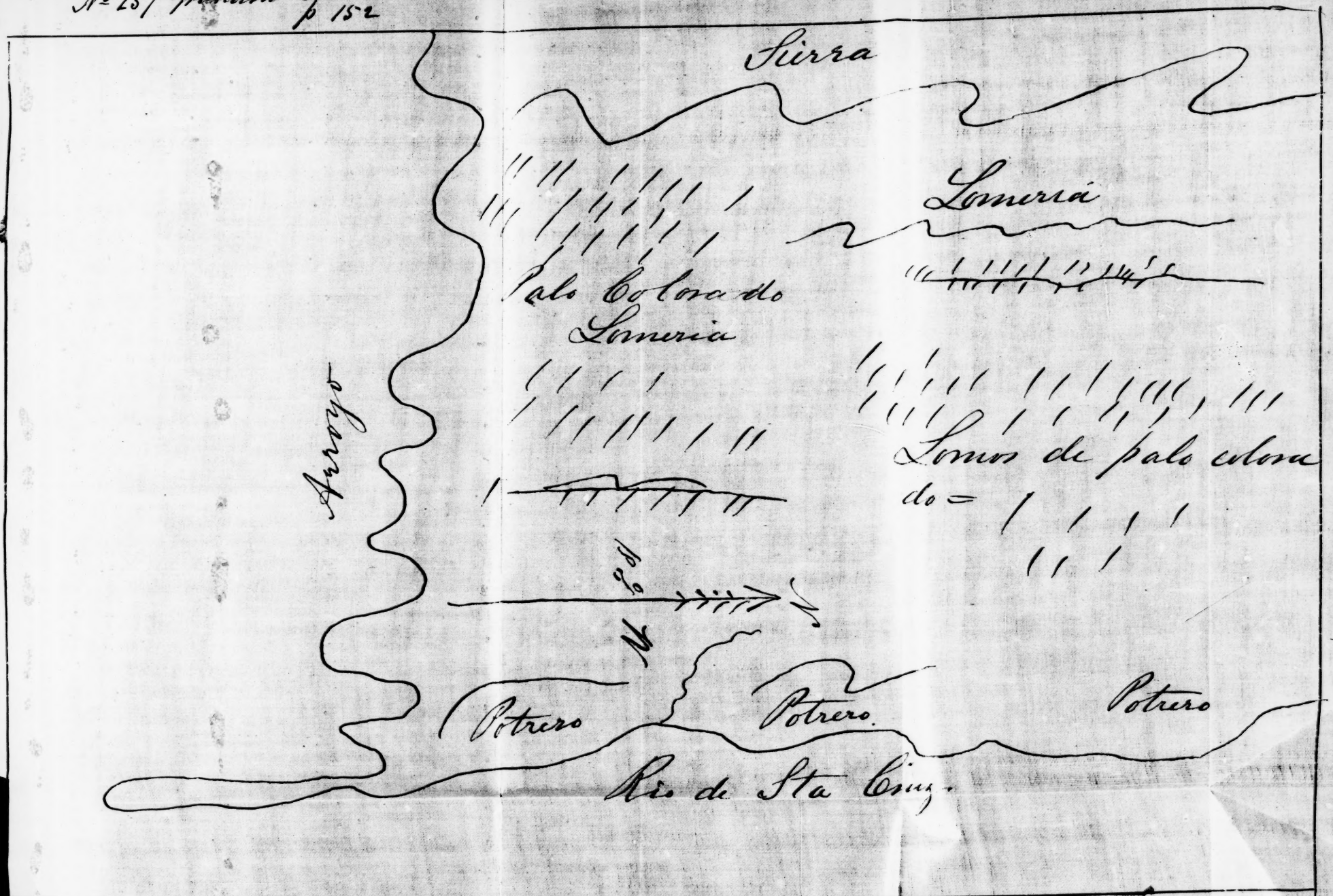
10th. And being so trespassers, the fact that said defendants levied and paid assessments, and expended moneys, or made improvements on the claims in question, cannot be pleaded as an estoppel by them, when the fact of the title is open and notorious, even though the owners stood by and saw it.

The following instructions, prayed for by the defendants, were given, and to the giving of each of them, the plaintiffs excepted. (*Fol.* 56.)

1st. If the Jury believe, from the evidence, that after the conveyance by Spear to the grantors of the defendants, Hearst, Strong and O'Neil, that Camp, or those claiming under him, either expressed or by implication, abandoned his claim to the possession of the premises, then, neither said Camp, nor the plaintiffs who claim under him, can now assert any right or title to the same, or against the defendants.

2d. If the Jury believe, from the evidence, that on the 30th day of March, 1860, Wm. S. Spear, being in the actual possession of the premises in controversy, and having no sufficient legal authority to sell and convey said premises to the defendants, or their grantors, assumed to convey, and did convey said premises by deed, under an assumed authority, as the attorney in fact of said Camp; and that immediately thereafter said defendants, or their grantors, went into possession, under said deed, with the knowledge and consent of said Camp, *or* of his agent and attorney, Musser, and made permanent and valuable improvements thereon, with the knowledge of said Camp, *or* said Musser, and that said Camp *or* said Musser acquiesced in said possession, without making any claim of title or right of possession to said premises, for the space of fifteen months or thereabouts; and during all that time, said Camp and said Musser neglected to pay any assessments or do any work on said premises, so as to save them from forfeiture and re-location under the mining laws of the district where said property is situated; that the said Camp and the said Musser are both estopped to set up the title of said Camp, against the defendants in this action; and the plaintiffs, claiming under said Camp and Musser, are equally estopped, and defendants are entitled to a verdict.

Nº 257 Graham et al vs U States
p 152



No 257 - Graham et al. U. States
Page 284.

PLAT

of the

RANCHO ZAYANTA

finally confirmed to

ISAAC GRAHAM et al.

Surveyed under instructions from the

U.S. Surveyor General

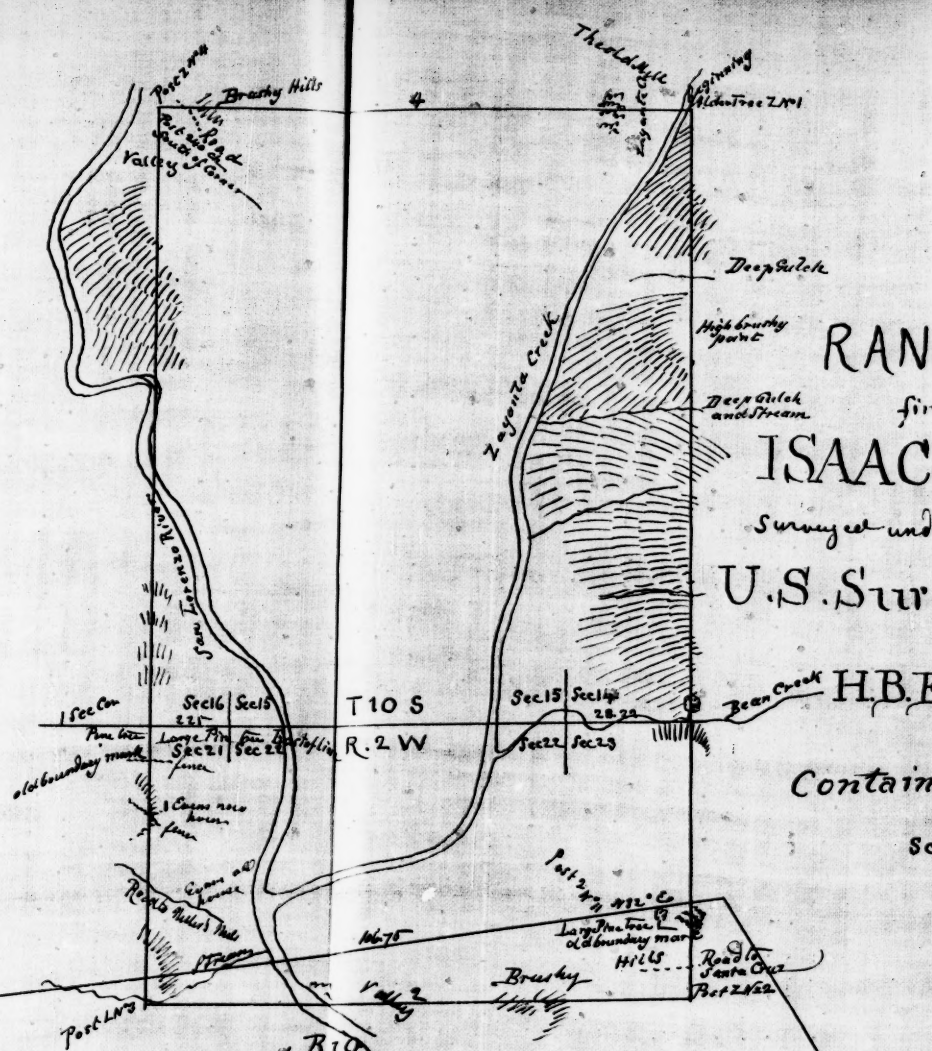
by

H.B. Edwards Dep. Surv.

April 1862.

Containing 2658 21/100 Acres

Scale 40 chs to 1 inch



Rancho de la Cañada del Rincon and Rio San Lorenzo de Santa Cruz.

V. 15° 45½ E.
W.

Boundaries		
No	Course	Dist
1	South	210.56
2	West	126.56
3	North	212.90
4	East	124.63
Aggregate		674.53
8 Miles 34 chs 52 lks		

The field notes of the Rancho Zayanta and from which this Plat has been made out have been examined and approved and all on file in this office
U.S. Surveyor General's office
San Francisco California
May 2nd 1862

E. T. Beale
U.S. Surv. Gen'l Cal.

Nº 257 Graham vs the States
page 10

Sierra

Sierra

Palos Colorados

Potreros

Potreros

Potreros

Arroyo Seco

Arroyo Seco

Arroyo de San Lorenzo

Tierras Labradas

Tierras Labradas

Coral Viejo

Lomaria

Lomaria

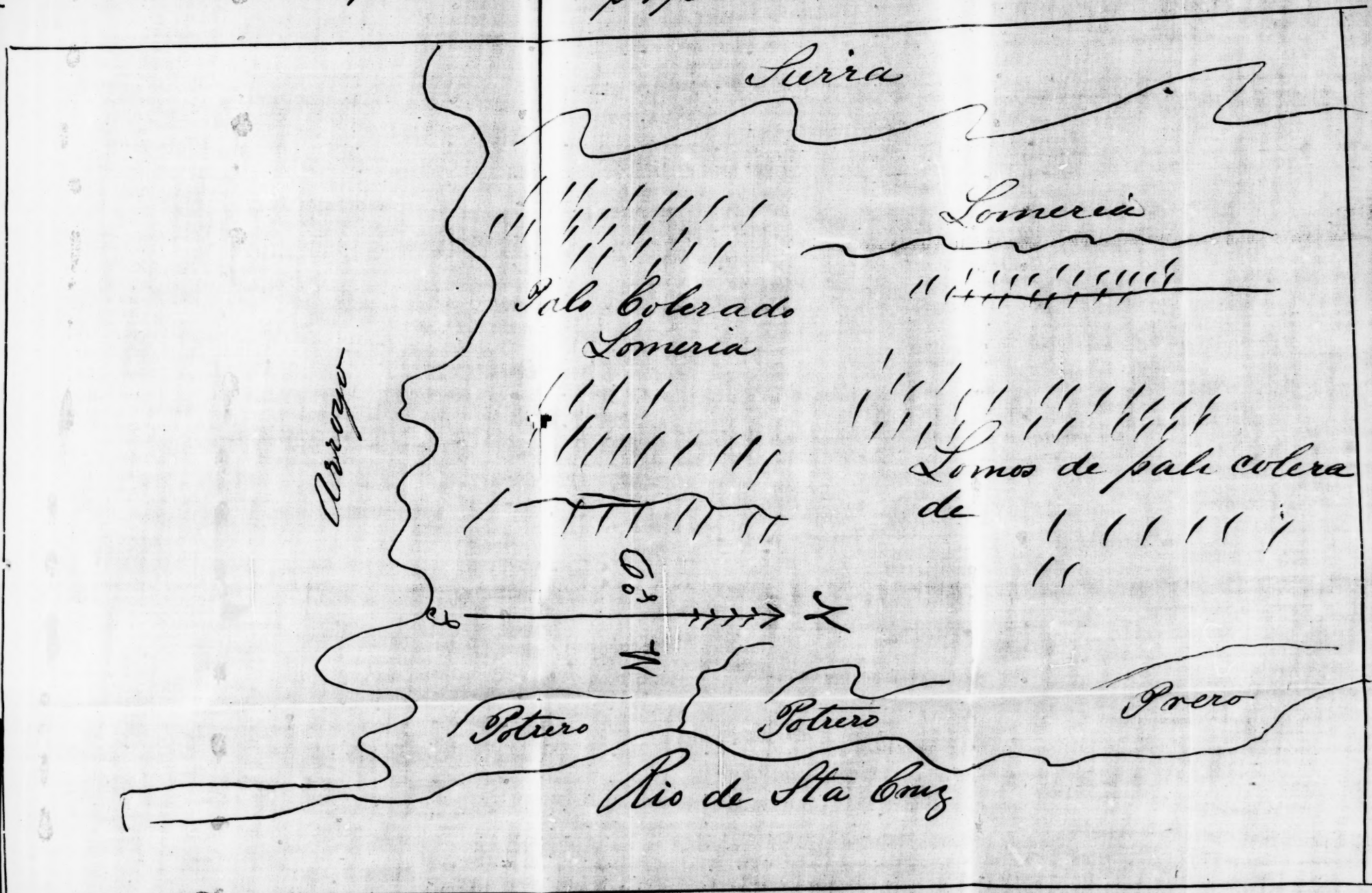
Camino de Saguata

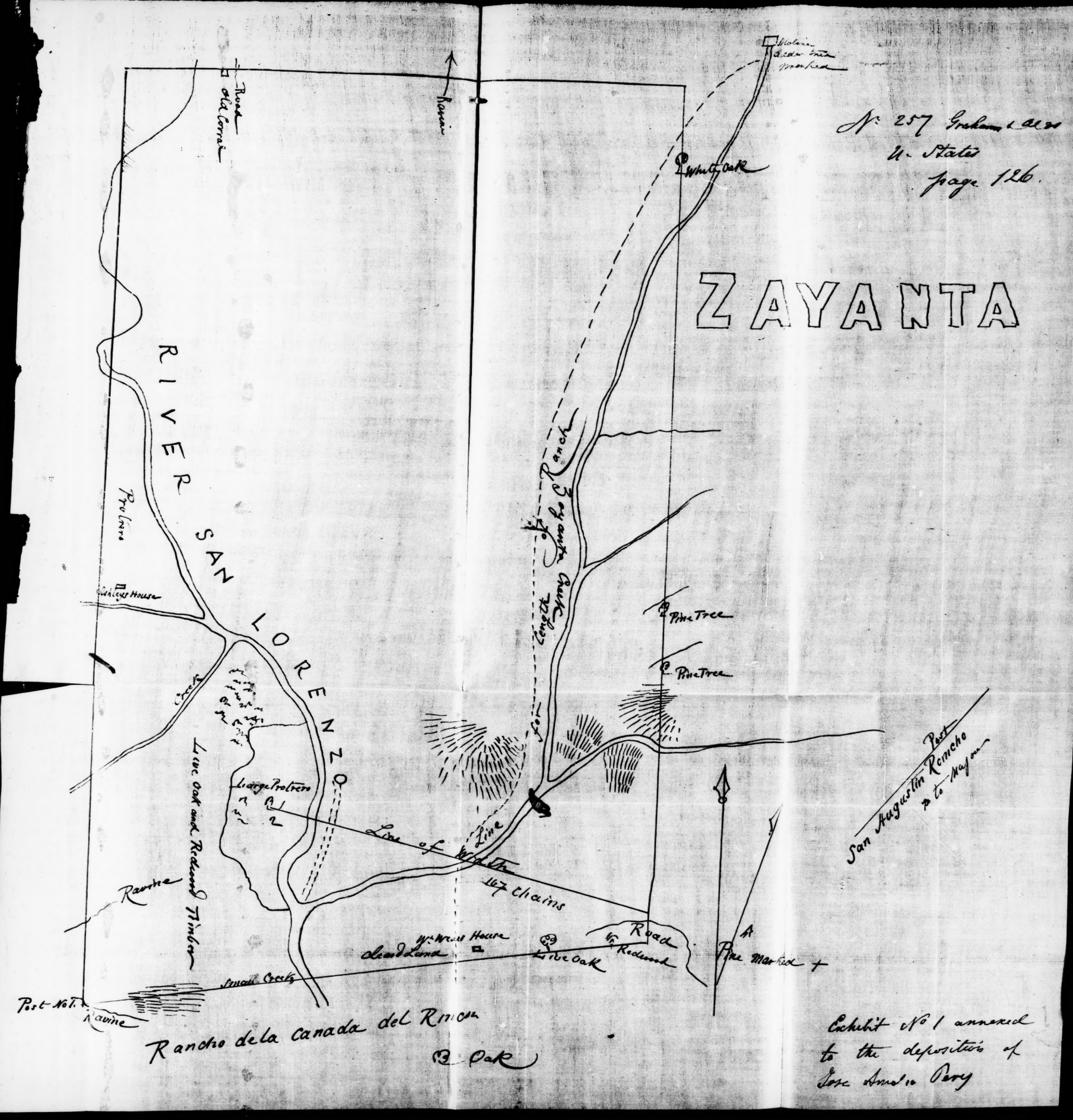
Casa

Casa

Casa

Graham et al. vs U. States
p 175




No 257 Graham et al vs U. States Page 126.
ZAYANTA
RIVER SAN LORENZO
Road to La Canada
Ravine
Prolero
Live Oak and Redwood Timber
Large Prolero
Line of Wm Reed
167 Chains
Line
Post
San Augustin Rancho
to Mayon
Ravine
Wm Reeds House
Road
Redwood
Live Oak
Pine Marked
Small Creek
Post No 1
Ravine
Rancho de la canada del Rincon
Oak
Pine Tree
Pine Tree
White Oak
Exhibit No 1 annexed to the deposition of Jose Arnolo Pery

Public Land

№257 Graham & al. vs N. States
pag 93.

PLAT
OF THE RANCHO
ZAYANTA

Confirmed to Isaac Graham et al.
surveyed under Instruction from
The U.S. Surveyor General
By John Wallace Dep.ty Surv.r
JANUARY
1859

Containing 2514 60/100 Acres
Scale 20 Chains To one Inch

The Field notes of the Rancho, Zayanta, and from which this Plat has been made out have been examined, approved and are on file in the Office U. S. Surveyor General's Office San Francisco, California

Signed J. W. Mandeville
U. S. Surveyor General

Field Notes

No	Courses	Dist
1	North	210.00
2	East	125.00
3	South	192.60
4	S 82 1/4 W	125.00

Post Z No 2 — Potrero — Rolling Sand Hills — Post Z No 3 — White Oak — Gulch — Zayanta Creek — Small Creek — Pine Tree — Ranchos — Post Z No 4 — Cleared Land — Wm Neary house — Gulch — Small Creek — Post Z No 1 — Rancho — Road — Creek — Large Potrero — Live Oak and Redwood Timber — Pool — Sec. 16 — Sec 21 — Sec. 15 — Sec. 22 — Sec. 14 — Sec 23 — T. 10. S. — R 2 W — Post Rancho — San Mateo Road — Variation 16° E — Yeal

RIVER SAN LORENZO

Certify this to be a full true and correct Copy of the Original plat in this Office
Given under my hand and seal of Office at the City of San Francisco Cal. this 9th day of July A.D. 1859

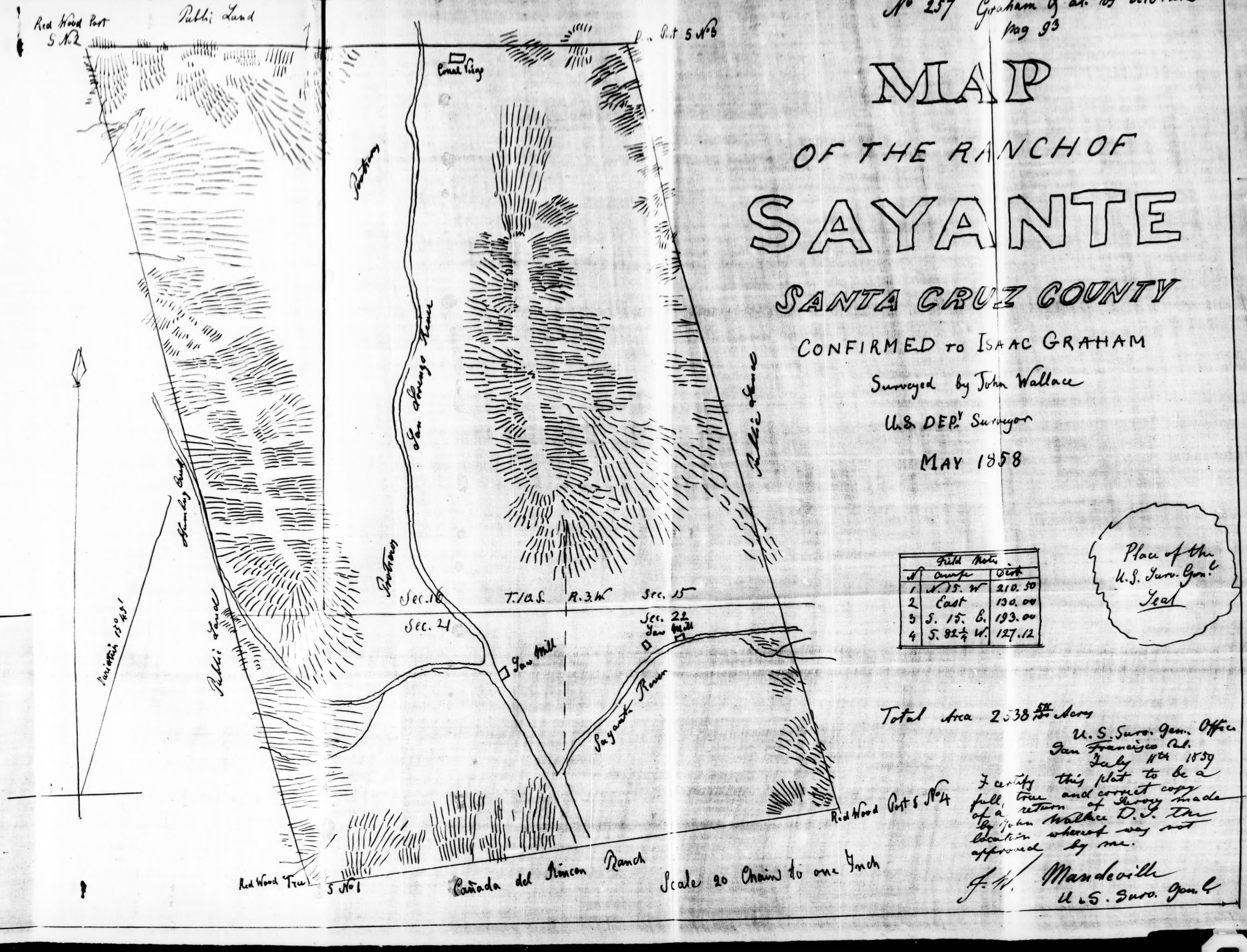
J. W. Mandeville
U. S. Surveyor Gl Cal.

Rancho de la Cañada del Rincon

No 257 Graham et al. vs U. States
Map 93

MAP
OF THE RANCH OF
SAYANTE
SANTA CRUZ COUNTY
CONFIRMED TO ISAAC GRAHAM

Surveyed by John Wallace
U.S. DEP.Y Surveyor
MAY 1858



Field Notes		
No	course	dist
1	N. 15. W	210.50
2	East	130.00
3	S. 15. E.	193.00
4	S. 82 1/4 W.	127.12

Place of the U.S. Surv. Gen.l Seal

Total area 2538 57/100 Acres

Scale 20 Chains to one Inch

U.S. Surv. Gen.l Office
San Francisco Cal.
July 11th 1859

I certify this plat to be a full, true and correct copy of a return of Survey made by John Wallace D.S. the location whereof was not approved by me.

J. W. Mandeville
U.S. Surv. Gen.l

N° 257 Graham vs U. States
pag. 50.

SURVEY

of Land

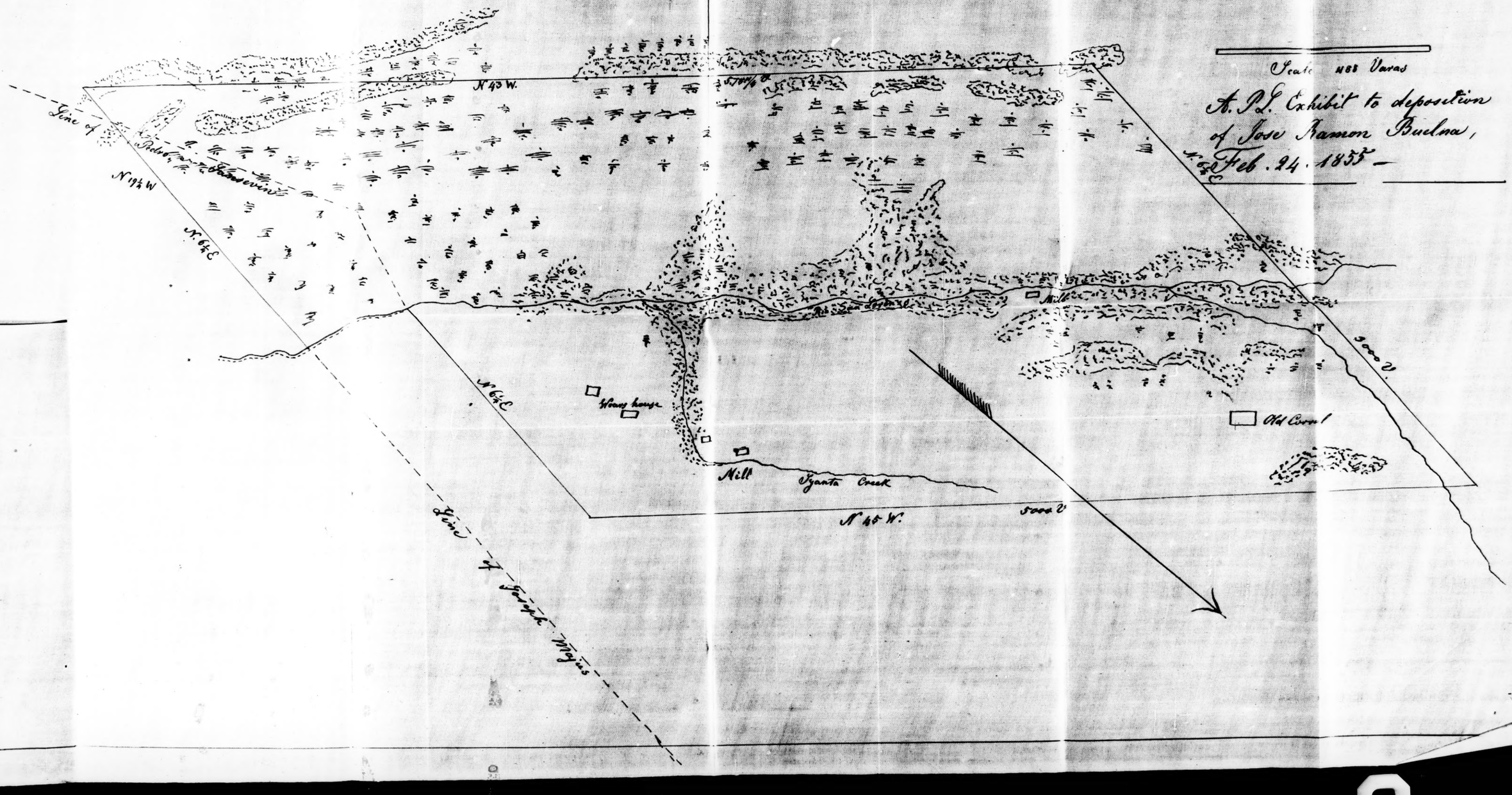
Belonging

to

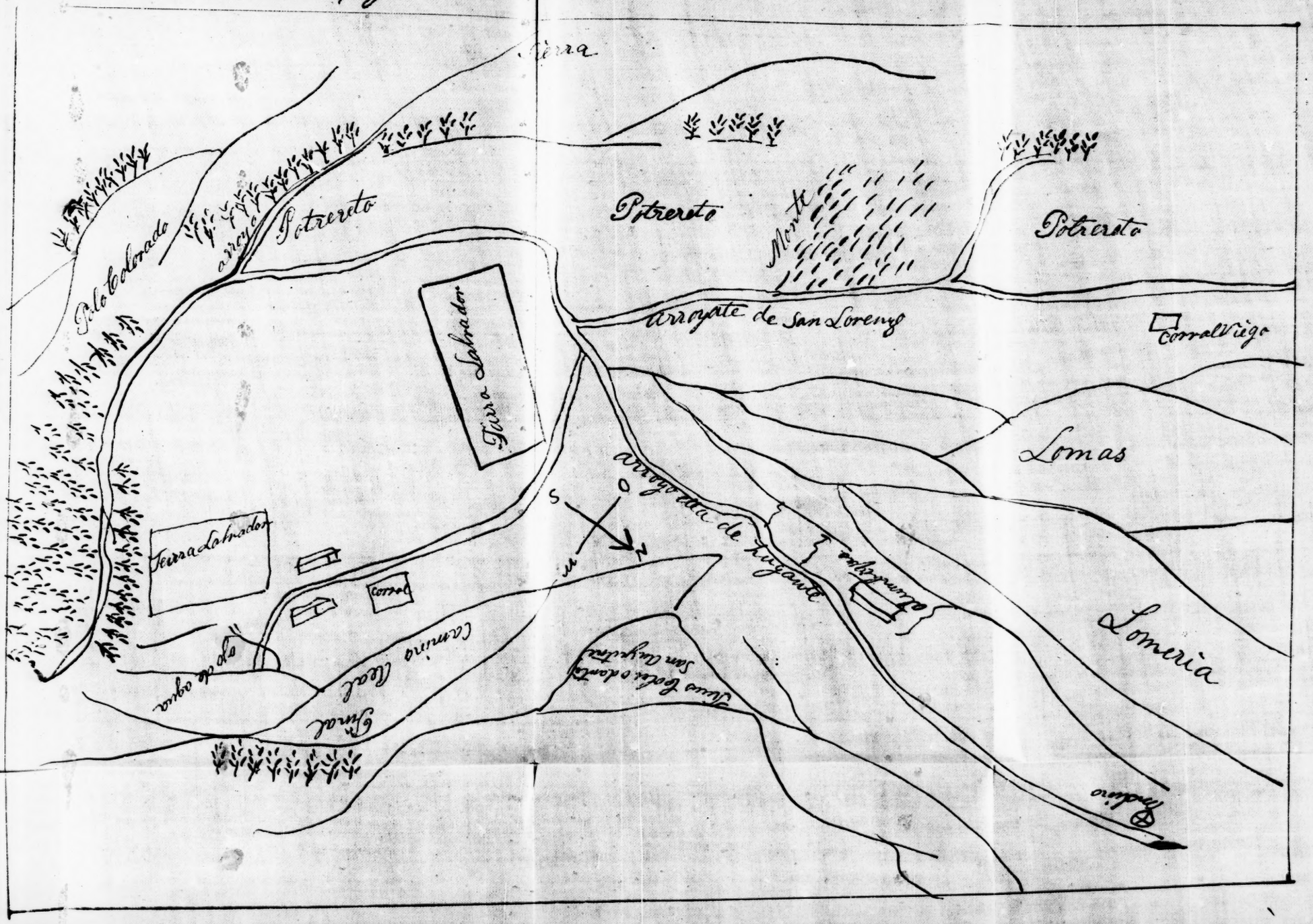
ISAAC GRAHAM

Scale 400 Varas

A. P. L. Exhibit to deposition
of Jose Ramon Buelna,
Feb. 24. 1855



No 257 Graham et al vs U States
10th page



No 257 Graham et al. vs U. States
Page 96.

Mountain Spring

Red Wood

Portrero

Point of mountain

Portrero

Lone Ranger

Lone Ranger Mill

The Land between these Portrero of Sand are covered with Shrub pines and brush Sand hilly

Magnetic Var. 15° 30' E

100 Chains

Graham field

Graham house

Graham field

Portrero

6 Miles

S 63 E

Sand Hills

Mole.

175 Chains

E of this line on Mountain Shrub timber but little grass

Red Wood

Portrero

Gulch

Point of Mountain

X 3/4 of Mile

Graham's Saw Mill

about 10 Chs to River

Dark Tree

Point of beginning N 58 E 64 Chains

B. F. Wright County Surveyor

Santa Cruz County

Cal. Nov. 29 1854

dense Redwood

Marsh

Mole

Mill

Graham's Hotel & Portrero

San Lorenzo

Graham Mare

Murry hunt

Mount

Mill

Ranch

Graham's house

to ogan

Road

Roth Ranch

B. Marked Tree

fence

America East Coast

Gulf of Mexico.

PRELIMINARY SURVEY
of the
Entrance to the Rio Grande
from the U. S Coast Survey.
1854

Observatory Lat. 25° 57' 22" N Long. 97° 7' 36" W.

Soundings in feet.

Magnetic Variation 1861 nearly Stationary

Scale of 10 Miles or 1 Sea Mile

Natural Scale 1/200000

Note — Tides.

The mean rise at the mouth of the River is usually small and influenced by the wind. At Brazos Santiago, which is about 18 miles N. of Rio Grande the tide ranges from 1 to 3 3/4 feet.

h. hard, s soft bottom.

Texas.

Mexico

Observatory

Bagdad

North Breakers

Virginia

Point

Boathouse Point

Bank's Channel

Division Line

E

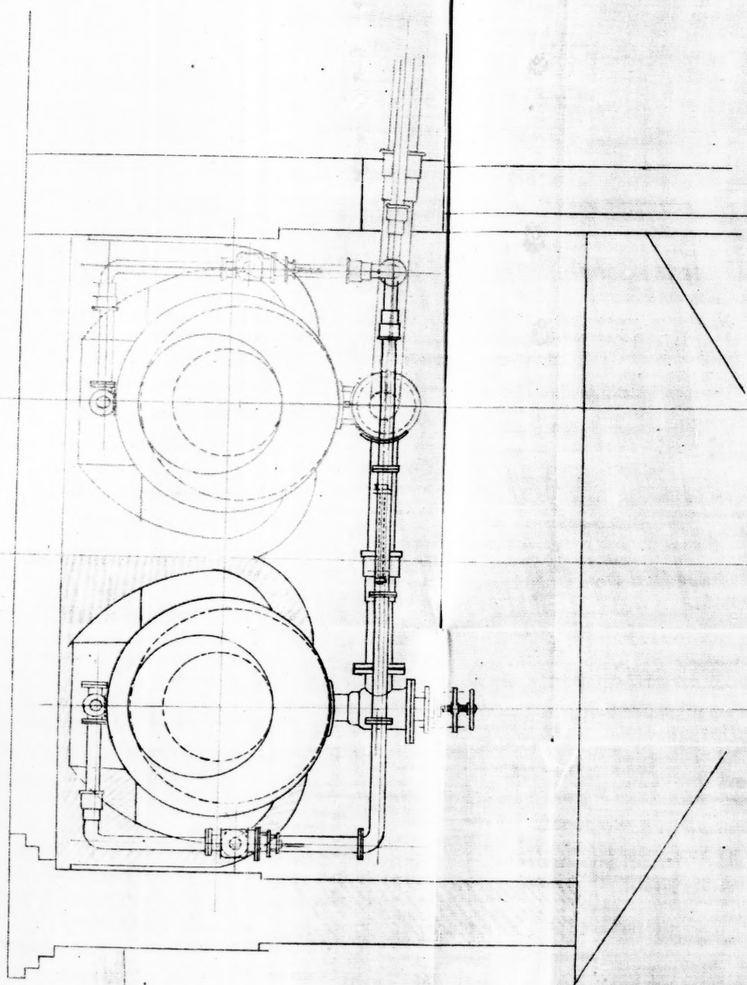
No 200 U. States or Burnt Boathouse Point

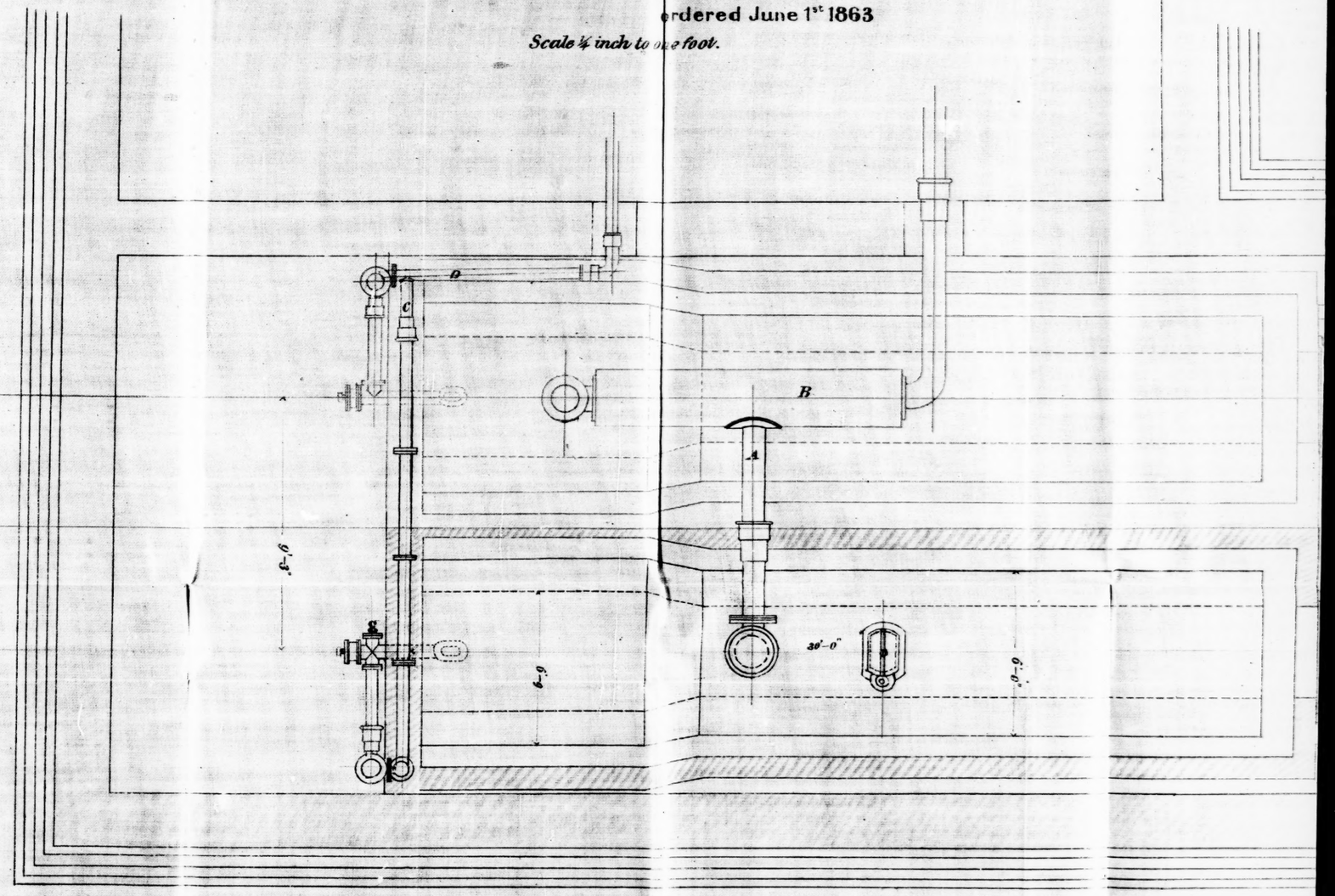
Page 133

№ 101 – U States vs. "Dashing Wave"
Transcript of Original Papers

MINERAL DE CATORCE MINES MEXICO
BOILER AND FITTINGS
ordered June 1st 1863

Scale ¼ inch to one foot.





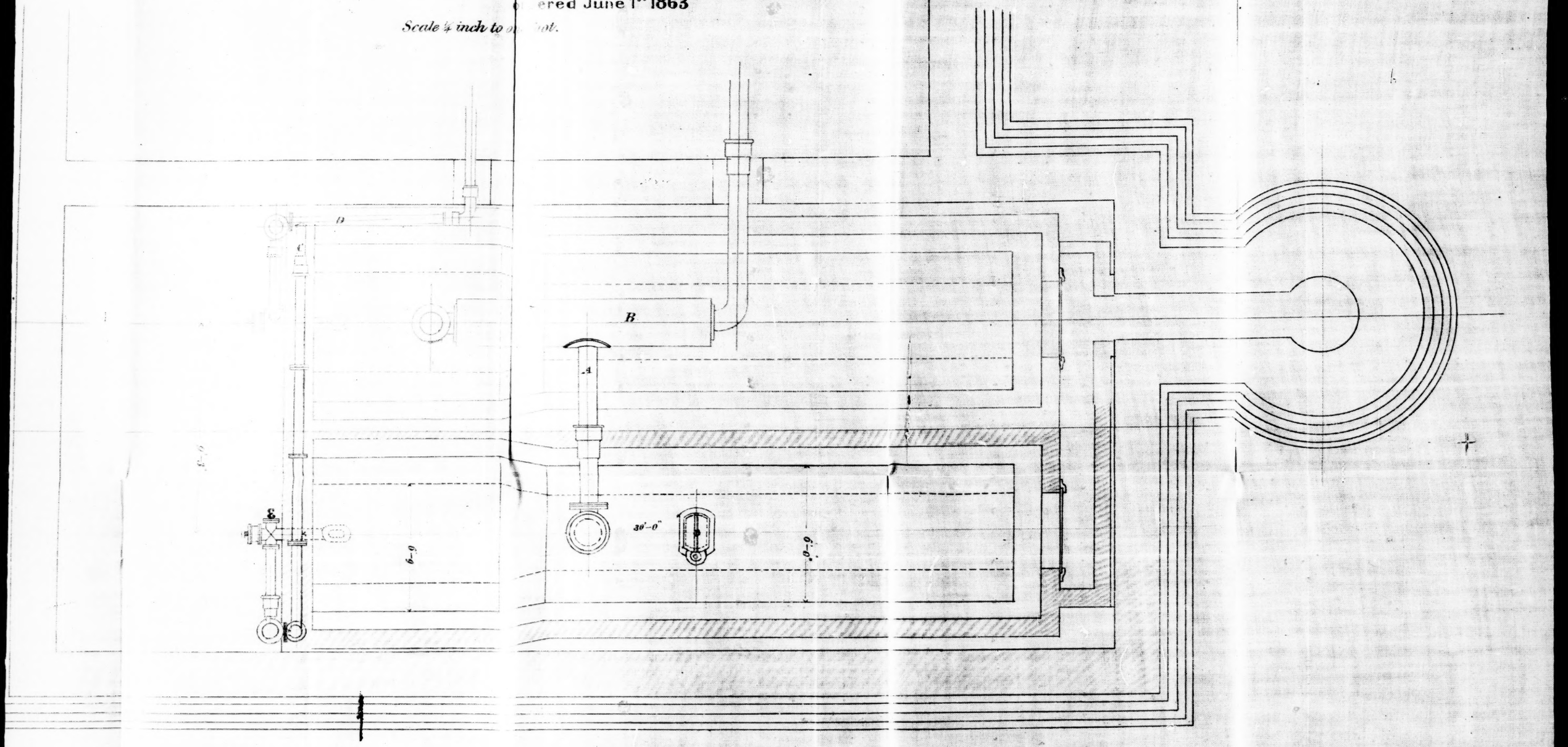
Note: The red lines show the Boiler sent with the 24 ins. Engine in 1855. The Black lines Boiler of the same dimensions ordered 1863 – with fittings complete. It is presumed the new Boiler intended to work the same Engine, the fittings are therefore arranged accordingly, and made as shown on this plan – The steam pipe A may join the existing steam chest B in any convenient position, so as to avoid the rivets and seams, or if this cannot be otherwise done, the steam chest may be turned partially around to clear the seams – The Feed pipe C for supplying the new Boiler is made with a circular flanch to join on the existing feed pipes D, and is to be secured to the same with two glands sent for this purpose. The top pipe E is made with two branches, as it is uncertain on which side of the Engine the present Boiler is placed either branch can be used, as will be found conveniently, the opposite being closed with a stopper sent for the purpose. —

Harvey

MINERAL DE CATORCE MINES MEXICO
BOILER AND FITTINGS

ered June 1st 1863

Scale ¼ inch to ot.



Note. The red lines show the Boiler sent with the 24 ins: Engine in 1855. The Black lines a Boiler of the same dimensions ordered 1863—with fittings compulsive. It is presumed the new Boiler is intended to work the same Engine, the fittings are therefore arranged accordingly, and made as shown on this plan.- The steam pipe A may join the existing steam chest B in any convenient position, so as to avoid the rivets and seams, or if this cannot be otherwise done, the steam chest may be turned partially around, to clear the seams -The Feed pipe C for supplying the new Boiler is made with a circular flanch to join on the existing feed pipes D, and is to be secured to the same with two glands, sent for this purpose- The tapping E is made with two branches, as it is uncertain on which side of the Engine the present Boiler is placed either branch can then be used, as will be found most convenient the opposite being closed with a stopper sent for the purpose.—

Harvey & Co - Hayle
August 1863